

3-21-2011

O'Shea v. High Mark Development Clerk's Record v. 7 Dckt. 37869

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IN THE

volume 7 of 9

LAW CLERK
SUPREME COURT
OF THE
STATE OF IDAHO

THOMAS O'SHEA and ANNE O'SHEA,

trustees of the Thomas and Anne O'Shea trust,

Plaintiff and

Appellants

vs.

HIGH MARK DEVELOPMENT, LLC

DALE A. SCHNEIDER, MATTHEW F SMITH, THE CHILDRENS CENTER

Defendant and

Respondents

Appealed from the District Court of the Seventh Judicial

District of the State of Idaho, in and for Bonneville County

Hon. Joel E. Tingey, District Judge

C. Timothy Hopkins

P.O. Box 51219, Idaho Falls, ID 83405-1219

Attorney for Appellant

Richard J. Armstrong

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Attorney for Respondent

Filed this day of , 20

MAR 21 2011

Clerk

By Deputy

37869

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS O'SHEA and ANNE)
DONAHUE O'SHEA, Trustees of the)
Thomas and Anne O'Shea Trust u/d/t)
DATED NOVEMVER 2, 1998;)
GRANDVIEW CREDIT, LLC, a)
California Limited Liability company;)
CALEB FOOTE, an individual,)
KATE LARKIN DONAHUE, an)
individual, JOHN KEVIN DONAHUE,)
an individual, and SAN FRANCISCO)
RESIDENCE CLUB, INC., a California)
Corporation:)

Plaintiff/Appellants,)

vs.)

HIGH MARK DEVELOPMENT, LLC,)
an Idaho limited liability company;)
GORDON ARAVE, individually and as)
Member of High Mark Development, LLC;)
BENJAMIN ARAVE, individually and as)
Member of High Mark Development,)
LLC, and JOHN DOES I-X,)

Defendant/Respondents.)

THOMAS O'SHEA and ANNE)
DONAHUE O'SHEA, Trustees of the)
Thomas and Anne O'Shea Trust u/d/t)
DATED NOVEMVER 2, 1998;)
GRANDVIEW CREDIT, LLC, a)
California Limited Liability company;)
CALEB FOOTE, an individual,)
KATE LARKIN DONAHUE, an)
individual, JOHN KEVIN DONAHUE,)
an individual, and SAN FRANCISCO)
RESIDENCE CLUB, INC., a California)
Corporation:)

Plaintiff/Appellants,)

Case No. CV-2008-4025

Docket No. 37869

Volume 7 of 9

vs.)
)
 DALE A. SCHNEIDER, an individual;)
 MATTHEW F. SMITH, an individual; THE)
 CHILDREN'S CENTER, INC., an Idaho)
 Corporation and THE IDAHO CHILDREN'S)
 CENTER, INC., an Idaho corporation,)
)
 Defendants.)
)
 _____)

* * * * *

CLERK'S RECORD ON APPEAL

* * * * *

Appeal from the District Court of the
 Seventh Judicial District of the State of Idaho,
 in and for the County of Bonneville

HONORABLE Joel E. Tingey, District Judge.

* * * * *

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IDAHO

2009 DEC 15 PM 4:36

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE
DONAHUE O'SHEA, Trustees of the
Thomas and Anne O'Shea Trust u/d/t
DATED NOVEMBER 2, 1998;
GRANDVIEW CREDIT, LLC, a
California limited liability company;
CALEB FOOTE, an individual,
KATE LARKIN DONAHUE, an
individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB,
INC., a California Corporation;

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,
LLC, an Idaho limited liability
company; GORDON ARAVE,
individually and as Member of High
Mark Development, LLC; JARED
ARAVE, individually and as Member
of High Mark Development, LLC;
BENJAMIN ARAVE, individually
and as Member of High Mark
Development, LLC, and JOHN DOES
I-X,

Defendants.

Case No. CV-08-4025

OBJECTION TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT / REPLY BRIEF IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT

COME NOW the Plaintiffs, by and through their counsel of record, the law firm of Hopkins Roden Crockett Hansen & Hoopes, PLLC, Idaho Falls, Idaho, and submit this Objection to Defendants' Cross-Motion for Summary Judgment.

INTRODUCTION

Defendants cannot overcome the fact that they made several fraudulent statements to the Plaintiffs. At every turn, Defendants concealed the financial instability of The Children's Center. Even if Defendants informed the Plaintiffs that "consideration" existed to extinguish the provision in the Lease regarding the option to purchase, the facts still support Plaintiffs' position that at no time did Defendants inform Plaintiffs of the Center's failure to pay rent, in direct contradiction with their actual claims regarding rent payment. The evidence supports the Court granting Plaintiffs *Motion for Partial Summary Judgment*. Defendants' *Cross-Motion for Summary Judgment* should be denied.

FACTS

Plaintiffs cite their *Brief in Support of Motion for Partial Summary Judgment* and *Statement of Facts in Support of Plaintiffs' Motion for Partial Summary Judgment* as general responses to Defendants' *Cross-Motion for Summary Judgment*. In addition, Plaintiffs have drafted a *Statement of Facts in Opposition to Defendants' Cross-Motion for Summary Judgment*, which is filed concurrently with this Brief.

STANDARD OF REVIEW

When both parties file cross-motions for summary judgment, as in the case at bar, the Court becomes the fact-finder and must evaluate each party's motion on its own merits. *Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 142 Idaho 218, 222, 127 P.3d 121 (2005); *Sorensen v. St. Alphonsus Regional Medical Center, Inc.*, 141 Idaho 754, 118 P.3d 86 (2005).

ARGUMENT

A. The facts do not support Defendants' defenses on Plaintiffs' claims of Breach of Contract and Breach of Good Faith and Fair Dealing.

Defendants have failed to show why they did not breach the Agreement and/or the covenant of good faith and fair dealing by delivering a knowingly fraudulent and false Lease Estoppel Certificate ("Estoppel"). There is no dispute that the April 18, 2007 promissory note was for rent deferral for the period of September 2006 through January 2007, during which time rent was unpaid. *Def's Statement of Facts*, ¶ 55. Furthermore, on October 18, 2007, the same day the Estoppel was signed, Jared and Gordon Arave signed a separate "Agreement" releasing the April 18, 2007 promissory note forever, leaving rent from September 2006 through January 2007 forever unpaid. *Def's Statement of Facts*, ¶ 121.

Based upon these undisputed facts, there is no question that the statements made in the Estoppel were secretly untruthful:

2. The Lease . . . is the only lease or agreement between the undersigned and the Landlord affecting the Premises."

3. "... full rent is accruing under the Lease."

4. "... Tenant is not aware of the existence of any condition which . . . would constitute a default under the Lease on the part of Tenant"

5. "All minimum monthly rent has been paid to the end of the current calendar month"

7. "The undersigned is not in default under the Lease"

See Armstrong Depo., Exh. 7. The rent deferral was in direct violation of the Lease Agreement, constituting a "default." *See Lease Agreement*, ¶ 13 (defining "default" as when "Lessee fails to timely pay any installment of the Monthly Rent").

The Defendants are responsible for this knowingly inaccurate information. Even if, as Defendants assert, Plaintiffs requested certain Estoppel language completely unrelated to the payment of rent (*Def's Statement of Facts*, ¶¶ 99-102), false statements or omissions related to the payment of rent were what was material in this case. Defendants knew they were providing a fraudulent document.

Defendants' defense that they never provided information about the tenant which "ran counter to the information in the Estoppel" is unavailing. Addendum 1 gives Plaintiffs the "option" of terminating the Agreement under certain circumstances; it does not limit Plaintiffs' remedies. The Agreement itself expressly does not limit Plaintiffs' remedies. *See Agreement*, p. 5 (the Agreement "shall not be considered as a waiver by BUYER of any other lawful right or remedy to which BUYER may be entitled.").

Furthermore, *Ervin Constr. Co. v. Van Orden*, 125 Idaho 738, 874 P.2d 549 (Ct. App. 1992) has been misapplied. The Court in *Van Orden* determined that a contractor substantially performed in the construction of a home, and was therefore entitled to recover payment from the owners. The Court stated: “A party’s material failure of performance has the effect of preventing the other’s duty from becoming due, at least temporarily, and of discharging that duty when the condition can no longer occur.” *Id.* at 741. Defendants have never shown a material failure of performance by the Plaintiffs under the Agreement and none exists.

Defendants breached the Agreement by knowingly providing false information to the Plaintiffs. Their motion regarding claims for breach of contract and breach of good faith and fair dealing should be denied and summary judgment should be granted to the Plaintiffs.

B. As Defendants are liable for both fraudulent misrepresentations and fraudulent concealments, their motion on these claims should be denied.

Plaintiffs have asserted two claims of fraud in the First Amended Verified Complaint—misrepresentation and concealment of material facts. *See Complaint*, ¶¶ 42, 56-57. Plaintiffs note that although a duty to speak is required in cases of fraudulent concealment, it is not an element of actual fraud. Defendants committed fraud by misrepresentation and concealment in this case.

The standard of review on summary judgment for fraud claims is not “clear and convincing evidence,” but only “whether the evidence is sufficient to create a triable

issue of fact.” *Clark v. The Spokesman-Review*, 144 Idaho 427, 431 n.1, 163 P.3d 216 (2007). Defendants have failed to show a triable issue of fact on the claims of fraud.

1. *Count III - Fraudulent Misrepresentation.*

Plaintiffs refer the Court to pages 7-13 of their *Brief in Support of Motion for Partial Summary Judgment* for Plaintiffs’ analysis of each element of fraud. Contrary to Defendants’ bald assertion, Defendants did make the following highly incorrect and incomplete representations relating to the Center’s historical performance in paying rent: (1) the LoopNet ad stating that “Schedule Gross Income” and “Net Operating Income” was \$299,850.00, (2) the August 27, 2007 fax from Gordon Arave via Paul Fife stating that High Mark had received \$324,836.00 in rent from June 2006 through July 2007, (3) the September 18, 2007 fax from High Mark, again showing \$324,836.00 in rent from June 2006 through July 2007, (4) the Estoppel, stating that all rent had been paid, and (5) Gordon Arave also directly stated to Paul Fife that the Center “had always paid rent on time and he hadn’t had any real problems[,]” words that were expressly conveyed to Jeff Needs. *See Fife Deposition*, p. 29, l. 21 – p. 30, l. 5; *Needs Deposition*, p. 88, l. 25 – p. 89, l. 8. Each of these representations was made by Defendants or agents of the Defendants, using information obtained by High Mark representatives, including Gordon Arave himself.

Plaintiffs have cited to no law to the affect that the existence of an agency agreement between Paul Fife and High Mark could somehow preclude Paul Fife from also acting in an agency relationship to Gordon Arave under the law. “Agency” is the

relationship resulting from manifestation of consent by one to another that the other shall act on his behalf and subject to his control and consent. *Thornton v. Budge*, 74 Idaho 103, 257 P.2d 238 (1953). Agency may be real, implied, or apparent. *Twin Falls Livestock Comm'n Co. v. Mid-Century Ins. Co.*, 117 Idaho 176, 181, 786 P.2d 567 (Ct. App. 1989). Gordon Arave believed that Paul Fife was acting as his agent. *See Gordon Depo.*, p. 76, ll. 19-23 (“He was acting as my agent through this transaction[.]”). Likewise, Paul Fife believed he was acting as Gordon Arave’s agent. *Fife Depo.*, p. 6, ll. 7-10 (“Q: Did you also represent Gordon Arave? A: Correct.”). Richard Armstrong was acting as the agent of Defendants, not only when he personally made revisions to the October 17, 2007 Estoppel (*See Armstrong Depo.*, p. 47, l. 11 – p. 49, l. 15), but also when he forwarded a fraudulent Estoppel to Paul Fife. *See Caballero v. Wikse*, 140 Idaho 329, 332, 92 P.3d 1076 (2004) (stating that the attorney is agent of the client).

Furthermore, it is irrelevant that the Estoppel was not signed by any of the Defendants. It was Defendants’ responsibility to deliver the Estoppel. Good faith and fair dealing demanded it be truthful, especially when Defendants and Defendant’s agent, Armstrong, knew that it was not.

Regarding justifiable reliance, “It is not a defense that the party alleging fraud could have ascertained the truth by conducting a more thorough investigation.” *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788 (2005); *see also Faw v. Greenwood*, 101 Idaho 387, 389, 613 P.2d 1338 (1980) (stating that the fact that the buyer “could have ascertained the truth by independent investigation is not a defense to [a] fraud

action[.]”). However, “[W]hen a purchaser is given an opportunity to conduct an independent investigation of the records **and does so**, . . . he is not entitled to rely on alleged misrepresentations of the seller.” *Watson*, 141 Idaho at 507. This investigation must be of records that would disclose the inaccuracy of the representation:

Because the investigation must foreclose actual reliance upon the alleged misrepresentation, the investigation actually made must be of records that would disclose the inaccuracy of the representation. It is not a defense that the party alleging fraud could have ascertained the truth by conducting a more thorough investigation. The issue is not one of contributory negligence; it is whether the party relied upon his own investigation and judgment of records that accurately disclosed the relevant fact rather than upon the alleged misrepresentation.

Id. (citations omitted).

Under Idaho law, Defendants must show that the Plaintiffs actually relied upon their own independent investigation of records “that would disclose the inaccuracy of the representation.” *Id.* Those facts do not exist in this case. Plaintiffs relied upon consistently fraudulent misrepresentations made by the Defendants, meant to induce reliance. Tom O’Shea, who acted as the principal for O’Shea Family Trust in purchasing the property, reviewed and relied upon each of the fraudulent documents and statements, as shown in Plaintiffs’ *Brief in Support of Motion for Partial Summary Judgment*. In addition to looking to Tom O’Shea’s guidance, the other individual plaintiffs were also heavily influenced by the fraudulent documents. Anne O’Shea reviewed the LoopNet listing and the Estoppel before investing. *Id.*, p. 10, ll. 6-18; p. 86, l. 10 – p. 87, l. 4.

According to Anne, “It’s just the confirmation or representations that, you know, yes, this

is a tenant; yes, they have a lease; yes, the lease is in full force; yes, they're – you know, there are no defaults; yes, they're paying the rent." *Id.*, p. 86, l. 25 – p. 87, l. 4.

Kevin Donahue relied on "the listing information, the financial information, [and] the Estoppel information" in deciding to invest in the property. *Deposition of Kevin Donahue*, p. 46, ll. 7-15. He trusted Tom O'Shea's review and interpretation that the Estoppel confirmed that "the tenant was not in default" and "all minimum monthly rent had been paid[,]" both of which were false. *Id.*, p. 47, l. 10 – p. 48, l. 21. San Francisco Residence Club and Kate Donahue decided to invest based on review of the LoopNet ad (*Deposition of Kate Donahue*, p. 34, l. 9 – p. 35, l. 9), and the Estoppel (p. 50, ll. 15-18).

Jack Chillemi, principal for Grandview Credit, reviewed the LoopNet ad (*Deposition of Jack Anthony Chillemi*, p. 28, l. 20 – p. 29, l. 5), and the faxed document from High Mark stating that the Center had paid all of its rent from June 2006 through July 2007. *Id.*, p. 40, l. 11 – p. 42, l. 12. Caleb Foote reviewed the LoopNet ad and financial information from Paul Fife containing "income statements that all rents were being paid on a current basis and there were no defaults." *Deposition of Caleb Foote*, p. 13, l. 25 – p. 14, l. 5. He also reviewed the Estoppel (*Id.*, p. 24, ll. 2-13), and the fax showing rent received from June 2006 through July 2007. *Id.*, p. 42, ll. 3-16. Caleb said, "Looked like all rents had been paid and that the building maintenance, expenses and everything else had been paid." *Id.*

Plaintiffs reviewed several financial and other documents, learned about the tenant through representations made by Gordon Arave through Paul Fife, visited and personally inspected the property, and attempted to meet the tenant while on site. *See Deposition of Thomas O'Shea*, p. 70, l. 20 – p. 72, l. 4. Plaintiffs conducted a thorough building inspection on the property, as evidenced by the Addenda to the Purchase and Sale Agreement (see discussion below). All of the Plaintiffs relied on the fraudulent documents to decide to purchase. The law does not support Defendants' argument that each and every plaintiff did not have to visit the property, meet all parties involved, and review each and every available document in order to claim justifiable reliance.

Regarding the balance sheet, the relevant entry showed as "Notes Payable" a note to "Jared and Gordon Arave" for 187,929.40, but did not state the purpose of the note. *See Armstrong Affidavit*, Exh. R. Even if Plaintiffs had received the balance sheet, they still would not have uncovered that rent had not been paid. Under these circumstances, "It is not a defense that the party alleging fraud could have ascertained the truth by conducting a more thorough investigation." *Watson*, 141 Idaho at 507.

The law does not support judgment for Defendants on Count III. Furthermore, Defendants' *Affidavit of Robert E. Miller* is discounted by the fact that Mr. Miller's conclusions are in direct contradiction to Idaho law as stated in *Faw v. Greenwood* and *Watson v. Weick*, as stated above. Defendants' Motion should be denied and summary judgment should be granted to the Plaintiffs.

2. *Count IV – Fraudulent Concealment of Fact.*

Defendants argue that absolutely no duty to speak existed as to the fraudulent nondisclosures of the Defendants. They claim that the Plaintiffs could have figured out the fraud for themselves through further investigation. Defendants cite as authority *Walker v. Nunnenkamp*, 84 Idaho 485, 373 P.2d 559 (1962), and *Brown v. Bledsoe*, 1 Idaho 746 (1879), neither of which involved a claim of fraud by nondisclosure. Defendants also cite *Janinda v. Lanning*, 87 Idaho 91, 390 P.2d 826 (1964), for its reference to *Brown v. Bledsoe*; however, *Brown* was only referenced by appellant counsel in *Janinda* and is not used as the law in that case. 87 Idaho at 96-98.

Plaintiffs have cited current fraudulent concealment law in *Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245 (2000) and *Watts v. Krebs*, 131 Idaho 616, 620, 962 P.2d 387 (1998) in their *Brief in Support of Motion for Partial Summary Judgment*, pages 13-14. To establish fraudulent nondisclosure, there must be shown that (1) there was nondisclosure, (2) the Plaintiff relied upon that nondisclosure, (3) the Plaintiff's reliance was material to the transaction, and (4) the Plaintiff was damaged as a proximate result of the nondisclosure. *Watts*, 131 Idaho at 619.

With regard to the element of reliance, "[f]raud may be established by silence where the defendant had a duty to speak. . . . A duty to speak arises in situations where the parties do not deal on equal terms or where information to be conveyed is not already in possession of the other party." *Watts*, 131 Idaho at 620. The Court in *Watts* summarized several instances in which a duty to speak may arise, which are mentioned

on Page 14 of Plaintiffs' *Brief in Support of Motion for Partial Summary Judgment* and applied to the specific fraudulent nondisclosures below.

Similar to the Defendants' argument in this case, the appellant in *Watts* ("Krebs") argued that he had no duty to disclose a fact because the respondent could have learned that fact by further personal investigation. *Id.* at 621. The Court again disagreed:

[I]n *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 768 (1977), *overruled on other grounds by Owen v. Boydstun*, 102 Idaho 31, 624 P.2d 413 (1981), this Court expressly concluded that the purchasers' failure to investigate a misstatement of tillable acreage made in a document given to them by the vendor did not negate their right to rely on the misstatement. The figures in the document had been prepared by the United States Department of Agriculture, but the purchasers brought an action for misrepresentation against the vendor. In noting that "silence, in circumstances where a prospective purchaser might be led to harmful conclusions, is a form of 'representation,'" the Court concluded that the vendor's failure to say anything when he gave the purchasers the document containing the misstatement of tillable acreage amounted to a misrepresentation. The fact that the purchasers could have checked the accuracy of the figures by visiting the tax assessor's office, did not negate the purchasers' right to rely on the figures.

Id. (emphasis added, citations omitted). The Court in *Watts* held that even if Watts could have discovered the concealed fact by further investigation, her failure to investigate did not negate her right to rely on Krebs' **duty to disclose all material facts**. *Id.* (Emphasis added).

Defendants in this case fraudulently concealed several things. Defendants had at several times told the Plaintiffs that all rent had been paid. Defendants knew that the truth about lack of rent payments was "not already in the possession" of the Plaintiffs,

and therefore they had a duty to speak. *Watts*, 131 Idaho at 620. Furthermore, disclosures of the April 18, 2007 Promissory Note and the October 18, 2007 Agreement were necessary to “prevent a partial or ambiguous statement of fact from becoming misleading.” *Id.* Disclosures were also necessary of the November 7, 2007 note, Scott Williams’ meeting, and the failure to pay rent in Pocatello, as they had the effect of making “a previous representation untrue or misleading.” *Id.* Under the circumstances, Defendants knew that Plaintiffs were about to rely upon several “false representation[s]” about the payment of rent. *Id.* Finally, because of the relationship between the parties in a commercial real estate purchase, Plaintiffs could “reasonably expect a disclosure of the facts[,]” especially since Defendants promised to provide an Estoppel. *Id.* For all of these reasons, there is no question that Defendants had a duty to speak and to make truthful disclosures.

They failed in this duty. As stated, the balance sheet does not disclose the material fact that the April 18, 2007 note was for numerous months of unpaid rent. *See Armstrong Affidavit*, Exh. R. Second, Defendants argue that Paul Fife put the Plaintiffs on notice of the October 18, 2007 Agreement when he allegedly shared with Jeff Needs that consideration for release of the right to purchase included release of “a note that The Children’s Center owed Gordon.” *Id.*, Exh. J. Again, even if the Plaintiffs had learned of this information, Defendants still did not disclose the material fact that the released note was for unpaid rent. *See Fife Deposition*, p. 51, l. 25 – p. 52, l. 7 (“Q. Did you know what the promissory note was all about? A. Did not. Q. Did you have any indication it

was for nonpayment of rent or for rent deferral, so to speak? A. No, sir. Q. So that wasn't communicated to Needs? A. No.""). This is highly significant, considering the fact that on the very same day the Defendants provided the Plaintiffs with the Estoppel saying that all minimum monthly rent had been paid.

Third, Defendants' argument that the November 2007 Promissory Note was executed so the Center could realize its business model of centralizing and consolidating operations is totally false. In his deposition, Matthew Smith does not refer to the November 2007 note as having this effect. *See Armstrong Affidavit*, Exh. W. Furthermore, the letter cited by Defendants was written two months before the November note. As vividly shown in emails from Armstrong to Weinpel, the real purpose of the November 2007 note was to defer unpaid and expected rent for the months of October and November, and was apparently hurried in an effort to prepare for closing:

November 5, 2007 email:

Can you provide me with any information as to whether the Center will pay its rent obligation for October 2007 for the Idaho Falls Property before November 15th?

November 7, 2007 email:

My client has asked me to contact you to discuss the option of satisfying the Center's rent obligation for October and November 2007 on the Idaho Falls property only through issuance of a promissory note. I have taken the liberty of drafting a note to this effect and have attached it for your review and comment. Understand that the note would only defer rent payments for October and November 2007 on the Idaho Falls building, and that the Center is still required to make timely non-deferred payments for December 2007

going forward, as well as remain current in its rent obligations on the Pocatello building.

Armstrong Depo., Exhs. 10 & 11. As Defendants have failed to show legal support for their defense against fraudulent nondisclosure, their Motion as to Count IV should be denied and summary judgment granted to the Plaintiffs.

3. *Plaintiffs have not “assumed liability” under the Agreement.*

Defendants’ reliance on paragraph 9(B) of the Agreement is unavailing. Paragraph 9(B) concerns inspections of the physical premises. Paragraph 9(B)(1) only applies when the buyer fails to tell the seller within the time period specified in the Agreement of disapproved items regarding condition and repair. Paragraph 9(B)(2) applies when the disapproved items are communicated to the seller within the appropriate time. When the conditions of 9(B)(2) are satisfied, “[t]his will remove the BUYER’S inspection contingency.”

Paragraph 9(B) must be read in conjunction with Addenda 2 through 4 of the Agreement. In Addendum # 2, the parties agreed the Buyer would obtain a site inspection report, which, if returned unsatisfactory, should be grounds for “terminat[ion] of this Agreement and recei[pt] [of] a full refund of Earnest Money.” Finally, Addendum # 4 provides as follows:

Buyer has completed its inspection of the property noting several minor items for repair. Seller has agreed to make the repairs at Seller’s cost prior to Closing. Should the repairs not be completed by Closing, Seller agrees to leave \$5,000 in escrow until repairs are completed. If repairs are not completed within 30 days of Closing, Buyer shall receive the \$5,000 from escrow and make repairs itself. Other than

these repair items, Buyer removes Building Inspection contingency.

(emphasis added). In other words, the buyers did give the seller written notice of disapprovals regarding the physical premises within the strict time period allotted in the Agreement, satisfying Paragraph 9(B)(2). The inspection contingency was removed. It is disingenuous for the Defendants to now argue that Paragraph 9(B)(1) applies to somehow cause Plaintiffs to “assume all liability”; including liability for the Seller’s fraud, misrepresentation and failure to disclose.

4. *The merger clause in the Agreement has no effect on Plaintiffs’ fraud claims.*

Finally, Defendants argue that the merger clause in the Agreement precluded reliance on any representation by Defendants or their agents unless they were in the Agreement. Not so. The purpose of a merger clause is “to establish that the writing constituted the parties’ entire agreement and superseded all prior informal understandings.” *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743 (2007). “If a written contract is complete upon its face and unambiguous, no fraud or mistake being alleged, extrinsic evidence of prior or contemporaneous negotiations or conversations is not admissible to contradict, vary, alter, add to, or detract from the terms of the contract.” *Posey v. Ford Motor Credit Co., Inc.*, 141 Idaho 477, 480, 111 P.3d 162 (2005). Merger clauses do not affect representations made after the contract. Furthermore, the LoopNet ad did not “contradict, vary, alter, add to, or detract from the terms of the contract.”

5. *Plaintiffs were entitled to rely upon the Estoppel Certificate.*

Even though the Estoppel that Defendants specifically promised to deliver stated that it was made “with the knowledge that it will be relied upon by Purchaser . . . to purchase the Property[,]” Defendants now argue that Plaintiffs had no right to rely upon the Estoppel. This is contrary to the law and the facts.

An estoppel certificate is “[a] signed statement by a party (such as a tenant or mortgagee) certifying for another's benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date.” BLACK'S LAW DICTIONARY 572 (7th ed.1999) (emphasis added). “The purpose of an estoppel statement is twofold: (1) to give a prospective purchaser or lender information about the lease and the leased premises and (2) give assurance to the purchaser or lender that the lessee at a later date will not make claims that are inconsistent with the statements contained in the estoppel.” A. Arnold & J. O'Neill, 1 REAL ESTATE LEASING PRACTICE MANUAL § 35:1 (West Online 2005) (emphasis added). “Estoppel certificates are important and useful devices to preserve and enhance the marketability of commercial property. They are widely used in commercial real estate transactions.” *Lakeview Mgmt., Inc. v. Care Realty, LLC*, 2009 WL 903818, *19 (D.N.H. 2009).

Plaintiffs are entitled to rely upon the Estoppel because (1) Defendants promised to and did deliver it; (2) Defendants knew it was meant by its very terms to be relied upon; (3) Defendants knew the information about the payment of rent was false; and (4) other significant documents sent from Defendants supported the Estoppel claims.

C. Rescission.

“A party seeking to rescind a transaction on the ground of fraud must restore or offer to restore the other party to the status quo before the contract was formed.” *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788 (2005) (emphasis added). In *Watson*, the Court analyzed the letter seeking rescission to determine whether proper tender was made. *Id.* at 507-08. The tender letter in this case occurred on October 3, 2008:

Plaintiffs hereby tender the Ammon property to Defendants in order to completely restore the parties' to their respective pre-contract positions. Tender of the property is conditioned on the payment of all sums and amounts expended by the Plaintiffs in conjunction with the transaction. This constitutes our tender of all consideration related to the transaction by appropriate instrument of conveyance. This offer is made with the intent that the parties' contract of sale be rescinded due to Defendants' failure to inform the Plaintiffs that the tenant, The Children's Center, Inc., was not paying its monthly rent. Plaintiffs will dismiss the Complaint against the Defendants in return for acceptance of this offer.

See Second Affidavit of Sean J. Coletti, Exh. C.

Plaintiffs' offer to restore the Defendants to the status quo was proper. It offered to completely restore the Defendants to their position prior to the entry of the Agreement. Defendants have not shown that Plaintiffs' tender was improper, as the property was available and ready to be returned at the time the offer was made.

“[T]he party seeking rescission must act promptly once the grounds for rescission arise.” *White v. Mock*, 140 Idaho 882, 888, 104 P.3d 356 (2004). In *White*, the plaintiff attempted rescission some 26 months after the grounds for rescission arose. *Id.*;

see also Blinzler v. Andrews, 94 Idaho 215, 485 P.2d 957 (1971) (waiting several years to claim rescission is untimely); *Gillingham v. Stadler*, 93 Idaho 874, 477 P.2d 497 (1970) (8 months is too long); *Metzker v. Lowther*, 69 Idaho 155, 204 P.2d 1025 (1949) (more than 9 months is too long); *Mulhall v. Lucas*, 37 Idaho 558, 217 P. 266 (1923) (7 months is too long); *Lithocraft, Inc. v. Rocky Mountain Mktg.*, 108 Idaho 247, 697 P.2d 1261 (Ct. App. 1985) (one year is too long); *cf. Hill v. Wilkinson*, 60 Idaho 243, 90 P.2d 696 (1939) (within three months is timely). Defendants have failed to state why four months should not be considered prompt in this matter. Their motion in this regard should be denied.

D. Individual Defendants.

As the individual Defendants committed fraud, Defendants' motion for summary judgment in this regard should be denied.

1. *Gordon Arave.*

Gordon was the one responsible for listing the property with Paul Fife. *Gordon Deposition*, p. 27, ll. 3-6. On behalf of High Mark, Gordon warranted to Fife that "all information provided by the SELLER herein and hereafter will be true and correct." *See Affidavit of Richard J. Armstrong*, Exh. K, ¶ 19. Nevertheless, Gordon provided fraudulent information to Fife that ended up in the LoopNet ad. *Id.*, p. 28, l. 21 – p. 29, l. 17. Gordon was represented by his agents Richard Armstrong and Paul Fife during the transaction, through whom fraudulent information and documents were relayed. Gordon knew that the Center's financial condition was unstable. Gordon did not disclose information about the Center's non-payment of rent to Paul Fife, although he

knew that the rent deferral note existed and ran contrary to the statements made in the Estoppel and other documents regarding the payment of rent. *Id.*, p. 98, ll. 18-24, p. 102, ll. 4-17. Gordon was careful not to disclose the purpose of the April 18, 2007 promissory note to Paul Fife. *Fife Deposition*, p. 51, l. 25 – p. 52, l. 7.

Most striking of all is that Gordon directly informed Paul Fife that the Center had paid all of its rent on time, as mentioned above, words that were directly conveyed to Jeff Needs. *Fife Deposition*, p. 29, l. 21 – p. 30, l. 5; *Needs Deposition*, p. 88, l. 25 – p. 89, l. 8 (stating that Fife had told him “that the tenant . . . was a strong tenant, had been paying every monthly rent on time, in a timely manner, had been a great tenant.”). Finally, even after the transaction was closed and the Center had left the premises, Gordon represented to Tom O’Shea that he knew nothing of any problems with the Center. *See Second Affidavit of Sean J. Coletti*, Exh. M.

2. Jared Arave.

Jared Arave is a part owner of High Mark Development. *Deposition of Jared Arave*, p. 6, ll. 17-20. Jared knew that the Center had not paid all of its rent, as evidenced by his signature on the April 18, 2007 promissory note. *Id.*, Exh. 6. Jared kept track of any payments made on that note. *Gordon Deposition*, p. 49, ll. 7-9. Jared knew that the rent for the months of September 2006 through January 2007 was never paid, as evidenced by his signature on the Agreement dated October 18, 2007. *Deposition of Jared Arave*, Exh. 15. Jared never informed the Plaintiffs that the information provided in the Estoppel was false.

3. *Benjamin Arave.*

Ben Arave is the managing member of High Mark Development.

Deposition of Gordon Arave, p. 5, ll. 2-3. Ben's involvement is stated in the Deposition of Matthew F. Smith, and described in Plaintiffs' *Statement of Facts in Support of Motion for Partial Summary Judgment*. Ben offered Matthew Smith a \$200,000 loan in lieu of the "standard rent" forbearances. The plan was for M. Smith Enterprises to loan the money to the Center, who would pay back M. Smith Enterprises on a regular basis, and M. Smith Enterprises would then pay Gordon on the 2005 Notes. *Deposition of Matthew F. Smith* p. 41, l. 20 – p. 42, l. 2. On the Araves' side, the plan was to "inflate the price of the building" by the amount loaned to Smith. *Id.*, p. 42, ll. 13-23. Ben Arave knew about the sale of 1675 Curlew and assisted Paul Fife with mortgage information. The balance sheet identified the loan as from "M. Smith Enterprises" instead of "High Mark," in accordance with Ben Arave's suggestion to Matthew Smith. Ben Arave never informed Fife or the Plaintiffs about this loan deal and inflation of the building price.

4. *Attorney Fees.*

Defendants do not challenge an award of attorney fees against High Mark Development. They incorrectly state the rule regarding commercial transactions in Idaho Code § 12-120(3). That statute allows for an award of attorney fees to the prevailing party "[i]n any civil action to recover on an open account, account stated, note, bill, negotiable instrument, guaranty, . . . and in any commercial transaction." (emphasis

added). This transaction was undeniably a “commercial transaction” as defined in the statute. Furthermore, Idaho Code § 12-120(3) does not require that there be a contract between the parties before the statute is applied; the statute only requires that there be a “commercial transaction.” *In re University Place/Idaho Water Center*, 146 Idaho 527, 541, 199 P.3d 102 (2008). The claims in this case clearly involved each individual defendant, as well as High Mark Development, whether or not the individual defendants were contracting parties. Accordingly, fees should be granted under this subsection.

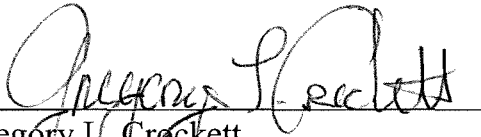
Defendants are also entitled to fees under Idaho Code § 12-121. Not only have Defendants committed a fraud upon the Plaintiffs, they have consistently asserted that rent was paid in the form of promissory notes. *See, e.g., Armstrong Depo.*, p. 57, ll. 16-25; *see also Williams Depo.* (Jun. 1, 2009), p. 13, l. 15 – p. 14, l. 11; p. 16, ll. 10-13; p. 21, ll. 5-8 (Armstrong and Williams discuss how rent was paid in the form of a Note); *Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment*, p. 2 (“some of the rent for the property at issue had been collected in the form of promissory notes.”) This defense is frivolous. Acceptance of a note does not constitute payment of rent. Defendants time and again relayed information to the Plaintiffs that all rent had been paid. Instead, Defendants just released the Center from ever paying on the April 2007 note. This frivolous defense entitles the Plaintiffs to fees under Idaho Code § 12-121.

CONCLUSION

For the reasons stated, Defendants' *Cross-Motion for Summary Judgment* should be denied, and Plaintiffs' *Motion for Partial Summary Judgment* should be granted.

Respectfully submitted this 15th day of December, 2009.


HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC

By: 
Gregory L. Crockett
Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 15th day of December, 2009.



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Attorneys for Plaintiffs

BONNEVILLE COUNTY
IDAHO

2008 DEC 15 PM 4:35

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE
DONAHUE O'SHEA, Trustees of the
Thomas and Anne O'Shea Trust u/d/t
DATED NOVEMBER 2, 1998;
GRANDVIEW CREDIT, LLC, a
California limited liability company;
CALEB FOOTE, an individual,
KATE LARKIN DONAHUE, an
individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB,
INC., a California corporation:

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,
LLC, an Idaho limited liability
company; GORDON ARAVE,
individually and as Member of High
Mark Development, LLC; JARED
ARAVE, individually and as Member
of High Mark Development, LLC;
BENJAMIN ARAVE, individually
and as Member of High Mark
Development, LLC, and JOHN DOES
I-X,

Defendants.

Case No. CV-08-4025

SECOND AFFIDAVIT OF SEAN J.
COLETTI

SEAN J. COLETTI, being first duly sworn on his oath, deposes and

says as follows:

1. I am an attorney for the Plaintiffs in the above captioned case. This affidavit is made on personal knowledge, and I am competent to testify to the matters stated herein.

2. Attached and incorporated as Exhibit A is a true and correct copy of selected additional pages of the *Deposition of Paul Fife*.

3. Attached and incorporated as Exhibit B is a true and correct copy of selected additional pages of the *Deposition of Jeffrey L. Needs*, with selected Exhibits.

4. Attached and incorporated as Exhibit C is a true and correct copy of selected additional pages of the *Deposition of Gordon Arave*, with selected Exhibits.

5. Attached and incorporated as Exhibit D is a true and correct copy of selected additional pages of the *Deposition of Anne Donahue O'Shea*.

6. Attached and incorporated as Exhibit E is a true and correct copy of selected additional pages of the *Deposition of Kevin Donahue*.

7. Attached and incorporated as Exhibit F is a true and correct copy of selected additional pages of the *Deposition of Kate Donahue*.

8. Attached and incorporated as Exhibit G is a true and correct copy of selected additional pages of the *Deposition of Jack Anthony Chillemi*.

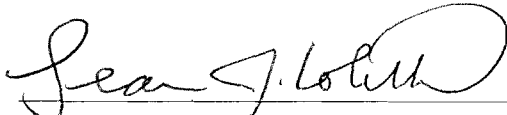
9. Attached and incorporated as Exhibit H is a true and correct copy of selected additional pages of the *Deposition of Caleb Foote*.

10. Attached and incorporated as Exhibit I is a true and correct copy of a selected additional pages of the *Deposition of Thomas O'Shea*.

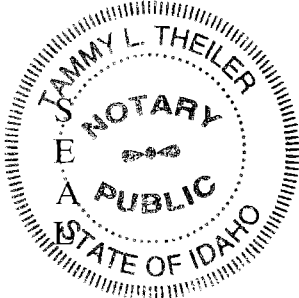
11. Attached and incorporated as Exhibit J is a true and correct copy of selected additional pages of the *Deposition of Richard J. Armstrong*, with selected Exhibits.


12. Attached and incorporated as Exhibit K is a true and correct copy of a selected exhibit from the *Deposition of Jared Arave*, with selected Exhibits.

DATED this 15th day of December, 2009.


Sean J. Coletti

SUBSCRIBED AND SWORN to before me this 15th day of December, 2009.

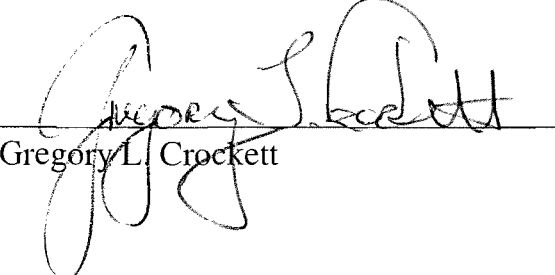



Notary Public for Idaho
Residing at: Idaho Falls
My Commission Expires: 09-03-14

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 15th day of December, 2009.



Gregory L. Crockett

Richard J. Armstrong, Esq.
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500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

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- ☐ Hand Delivery
- ☐ Facsimile

Marc Weinpel, Esq.
1975 Martha Avenue
Idaho Falls, Idaho 83404

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Facsimile

Transcript of the Testimony of:
Paul Fife

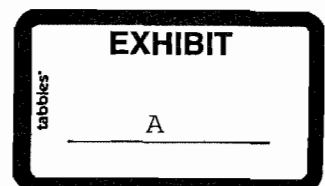
Date: September 25, 2008

Volume: I

Case: O'SHEA vs. HIGH MARK DEVELOPMENT

Printed On: December 15, 2009

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Page 6

1 A. I don't.
 2 Q. What was, in fact, your involvement in
 3 the purchase and sale of the commercial building in
 4 Idaho Falls located at 1675 Curlew?
 5 A. I was the listing agent.
 6 Q. And you indicate you were the agent.
 7 Who were you the agent for?
 8 A. Arave or High Mark Development.
 9 Q. Did you also represent Gordon Arave?
 10 A. Correct.
 11 Q. And did you represent anybody else other
 12 than High Mark and Gordon Arave?
 13 A. Did not.
 14 Q. So you did not act as agents in any way
 15 for the buyers in this transaction, did you?
 16 A. Did not.
 17 Q. Did the buyers, in fact, have their own
 18 real estate agent?
 19 A. They did.
 20 Q. Who was that?
 21 A. Jeff Needs.
 22 Q. And did you personally deal with
 23 Mr. Needs?
 24 A. I did.
 25 Q. And did you share a commission with

Page 7

1 Mr. Needs as part of this --
 2 A. I did.
 3 Q. -- transaction?
 4 MR. CROCKETT: Can we have this marked as an
 5 exhibit, please.
 6 (Exhibit *-001 marked.)
 7 Q. BY MR. CROCKETT: Mr. Fife, I'm going to
 8 show you what's been marked as Exhibit No. *-001,
 9 Deposition Exhibit No. *-001, and tell me if you can
 10 identify the document.
 11 A. Yes. That's the listing agreement for
 12 the property.
 13 Q. Okay. When we're talking about "the
 14 property," we're still talking about the property at
 15 1675 Curlew Drive?
 16 A. Correct.
 17 Q. Tell me, in general, what you undertake
 18 on behalf of your clients, High Mark and Gordon
 19 Arave, pursuant to this agreement.
 20 MR. ARMSTRONG: Objection. The document
 21 speaks for itself. Calls for a legal conclusion.
 22 Q. BY MR. CROCKETT: Answer the question.
 23 A. Just representation to the seller to try
 24 to procure a buyer for his property.
 25 Q. And in that regard you're the exclusive

Page 8

1 agent, right?
 2 A. Correct.
 3 Q. What does that mean?
 4 A. Well, I'm the sole broker representing
 5 his property.
 6 Q. And were you acting as a broker in this
 7 context?
 8 A. Well, I'm an associate broker. Doug
 9 Page is our acting broker.
 10 Q. Okay. Can you explain to me the
 11 difference? Is there a difference?
 12 A. Well, he -- Doug would be responsible
 13 for all documentation. It's up to him to create the
 14 files or make sure the files are in order.
 15 Q. I see.
 16 A. I am the -- you know, I was essentially
 17 the selling agent.
 18 Q. Okay. I'm just trying to understand the
 19 respective roles there. Are the roles different,
 20 that is, of a broker and as a selling agent?
 21 A. Well, yeah, because the broker has no
 22 input as far as the selling or the transaction, the
 23 actual input of the information and procuring the
 24 purchase.
 25 Q. As part of your, I guess, contractual

Page 9

1 obligations in this context, do you undertake
 2 obligations to do advertising and promotions of the
 3 property?
 4 A. I do.
 5 Q. And did you in this case undertake
 6 advertising and promotion?
 7 A. I did.
 8 Q. Can you just explain in general what you
 9 did in terms of advertising and promoting the sale of
 10 this property?
 11 A. We listed it in the MLS service, which
 12 is a multiple listing service for the Upper Snake
 13 River Valley. The property was listed with LoopNet,
 14 which is a portal that reaches a lot of commercial
 15 buyers.
 16 MR. ARMSTRONG: Was that LoopNet?
 17 THE WITNESS: LoopNet.
 18 MR. ARMSTRONG: LoopNet.
 19 THE WITNESS: That's actually where the
 20 contact was made through was through that.
 21 Q. BY MR. CROCKETT: Did you do any other
 22 advertising?
 23 A. Did some newspaper advertising. I think
 24 that's probably about it.
 25 Q. Did you retain copies of all your ads

1023

3 (Pages 6 to 9)

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Page 28

1 that stand for capitalized rate of return?

2 A. Right.

3 MR. ARMSTRONG: Objection, calls for
4 speculation. The document speaks for itself. Go
5 ahead and answer.

6 Q. BY MR. CROCKETT: Your definition of cap
7 rate, would that mean capitalized rate of return?

8 A. It does, but cap rate changes if there's
9 a mortgage in place. The cap rate was based on a
10 debt free building at that point. No mortgage
11 involved.

12 Q. I see. Somebody to come in and are
13 prepared to invest 3.8 million?

14 A. Correct.

15 Q. All right. So, presumptively, if there
16 is a mortgage in place, the cap rate, would it go up
17 or down?

18 A. It changes every month as the payments
19 come in.

20 Q. As you reduce the mortgage though, does
21 the cap rate go up or down?

22 A. It will go up.

23 Q. In terms of advertising the property
24 amongst your colleagues in the profession, is that an
25 attractive cap rate?

1 must have been of interest.

2 Q. Did you keep any copies of any of your
3 newspaper advertising?

4 A. That far back I probably do not have
5 copies of that.

6 Q. Do you ever recall having talked
7 directly with Gordon Arave about the existing lease
8 with The Children's Center?

9 A. We had discussions on it, yes.

10 Q. Okay. Can you tell me when you recall
11 discussions between you and Mr. Arave? When would
12 those have occurred, to the best of your
13 recollection?

14 A. Well, during the listing term and prior
15 to this agreement, and actually during the -- you
16 know, during procuring the agreement.

17 Q. All right. Tell me, where would these
18 conversations have occurred, to the best of your
19 recollection?

20 A. Where they would have occurred?

21 Q. Yeah.

22 A. I was on my phone in my office and he
23 was on his phone in his office.

24 Q. Okay. Tell me about the substance of
25 your phone discussions with Mr. Arave.

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Page 29

1 MR. ARMSTRONG: Objection, calls for
2 speculation. Vague. Ambiguous. Argumentative.

3 THE WITNESS: Yes, it is.

4 Q. BY MR. CROCKETT: Okay.

5 A. I should state in -- at the time that we
6 were doing the marketing on that; current conditions,
7 it is not.

8 Q. What would the current conditions
9 indicate would be an attractive cap rate?

10 A. Well, still -- I mean, it's still -- a
11 10-year lease is still an attractive cap rate, but
12 it's -- I mean, we're seeing stuff at 8 and a half.

13 Q. Do you think the 10-year lease, triple
14 net, was a material aspect of this transaction from
15 the buyers' standpoint?

16 A. Yes.

17 MR. ARMSTRONG: Objection. Foundation.
18 Calls for speculation.

19 You need to wait for me to get my
20 objection in. I'm sorry. Go ahead.

21 THE WITNESS: Yes.

22 Q. BY MR. CROCKETT: Was that expressed to
23 you by Needs?

24 A. No. I can't say for sure he expressed
25 that. I mean, obviously, he made the call on it. It

1 A. Our primary issue with the lease was
2 that the original lease called for the tenant to have
3 the right to purchase the building within the first
4 three years of the lease.

5 Q. I see.

6 A. It had turned into a roadblock on a
7 prior purchase and sale agreement that we had started
8 on.

9 Q. On the same property?

10 A. Yes.

11 Q. So that was an impediment to doing a
12 previous deal them?

13 A. Uh-huh.

14 Q. Yes?

15 A. Yes.

16 Q. Did you ever have any discussions with
17 Mr. Arave concerning the financial stability of the
18 tenant, The Children's Center?

19 A. Not directly, no.

20 Q. Any indirect communications about that?

21 A. Gordon indicated that he had always paid
22 on time and he hadn't had any real problems with him.

23 Q. And he expressly told you that?

24 A. Uh-huh.

25 Q. Is that a yes?

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1 A. Yes.
 2 Q. Do you remember when he would have said
 3 that?
 4 A. Exact date, no. During our listing
 5 agreement.
 6 Q. Okay. Did you ever have any
 7 communications with Benjamin Arave?
 8 A. I did, yes.
 9 Q. Concerning this transaction?
 10 A. Yes.
 11 Q. And who is Benjamin Arave?
 12 A. I understand Ben is a partner in the --
 13 I want to say --
 14 Q. High Mark Development?
 15 A. High Mark, yes. Basically Ben provided
 16 me information on the loan, on the existing mortgage
 17 that I was able to relay to Jeff Needs.
 18 Q. So some of the information you provided
 19 on to the buyers was provided by Benjamin Arave then?
 20 A. Yes.
 21 Q. And specifically what kind of
 22 information?
 23 A. Related to the existing mortgage.
 24 Q. Okay. How about related to the existing
 25 lease and tenant?

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1 A. I don't think I received anything from
 2 Ben on that.
 3 Q. Okay. And did you actually receive
 4 information from Ben?
 5 A. Just he created a link to get ahold of
 6 the men in charge of the existing mortgage, and then
 7 we were able to create a connection with O'Sheas and
 8 the lender.
 9 Q. What other involvement do you
 10 remember -- what other involvement do you remember by
 11 Benjamin Arave?
 12 A. That's primarily it.
 13 Q. And how did these communications with
 14 him occur? Were they in person or over the phone?
 15 A. Over the phone.
 16 Q. And do you know where he was?
 17 A. Not for sure, no. I believe he was down
 18 south, Phoenix, Las Vegas, or someplace like that.
 19 I'm not for sure of that when I did talk to him.
 20 Q. Is he related to Gordon Arave, to your
 21 knowledge?
 22 A. I understand he is.
 23 Q. And do you know the relationship?
 24 A. Not for sure. I want to say brother,
 25 but I'm not dead positive about that.

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1 Q. Do you know Jared Arave?
 2 A. No.
 3 Q. Did you ever have any communication in
 4 this context with Jared Arave?
 5 A. Not that I'm aware of.
 6 Q. Let me go back to the LoopNet listing
 7 here and let me just ask you here. You've got up in
 8 the right-hand corner -- I'm sorry -- the left-hand
 9 corner of the second page the scheduled gross income
 10 and the net operating income at \$299,850. When you
 11 posted that information, did you presume that that
 12 was actual money that had been paid by the tenant to
 13 the landlord?
 14 A. I did.
 15 Q. Do you have any reason to believe that
 16 that was not the case?
 17 A. I do not.
 18 Q. We have some information that we've
 19 developed in this case that some of that money would
 20 have been represented by deferred payments or
 21 promissory notes. Was that ever disclosed to you?
 22 A. No.
 23 Q. Do you think that would have made a
 24 difference to the buyer in the case --
 25 MR. ARMSTRONG: Objection, calls for

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1 speculation.
 2 Q. BY MR. CROCKETT: -- had they known that
 3 some of that money had not actually been paid but --
 4 MR. ARMSTRONG: Same objection.
 5 THE WITNESS: If they had not known, it
 6 probably would have, I guess. Yes, it would have.
 7 (Exhibit *-003 marked.)
 8 Q. BY MR. CROCKETT: Paul, I'm going to
 9 hand you what's been marked as Deposition Exhibit No.
 10 *-003. And if you want to just stack those over here
 11 as we go through them so we don't lose track of them.
 12 Do you recognize that as being an e-mail or a
 13 printout of an e-mail correspondence between you and
 14 Jeff Needs?
 15 A. Yes.
 16 Q. It seems like the first e-mail -- down
 17 in the bottom of the page, it says from Paul Fife to
 18 Jeff Needs, with a date, August 9, 2007, correct?
 19 A. Correct.
 20 Q. And if I represent to you that the
 21 purchase and sale agreement -- well, let me just go
 22 through this right now. I'm going to mark this as
 23 *-004.
 24 (Exhibit *-004 marked.)
 25 Q. BY MR. CROCKETT: Let me just ask you to

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1 certificate?
 2 A. I was.
 3 Q. And what did you understand those
 4 considerations to be?
 5 A. It was a note that The Children's Center
 6 owed Gordon in exchange for the note. That's what
 7 they used to remove the phrase from the document,
 8 from the lease.
 9 Q. Which phrase?
 10 A. The right to repurchase.
 11 Q. I see. Any other considerations you
 12 recall?
 13 A. Not that I'm aware of.
 14 Q. How did you know that there was this
 15 consideration in exchange for the lease estoppel
 16 certificate?
 17 A. Well, Gordon told me that that's what
 18 they'd come up with to try to make it happen.
 19 Q. Was that communicated to Needs or any
 20 other agent of the buyers?
 21 A. It was.
 22 Q. And how did you communicate that?
 23 A. Verbally.
 24 Q. And when do you recall that
 25 communication would have occurred?

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1 A. Well, it had to be in the same time
 2 frame as when the certificate was put together or
 3 prior to.
 4 Q. And how did the communication occur
 5 though? Was it by telephone?
 6 A. By telephone.
 7 Q. And tell me what you recall then the
 8 substance of your conversation with Needs concerning
 9 the consideration extended for the lease estoppel
 10 certificate.
 11 A. I'm not sure I -- bring that by me
 12 again, please.
 13 Q. Well, the question is simply what do you
 14 recall specifically about your phone discussion with
 15 Needs?
 16 A. Well, obviously, in the original --
 17 start of the transaction their concern again was that
 18 -- I expressed my concern to Gordon and that's when
 19 they kind of came up with -- you know, they tried to
 20 work it out with Matt to remove that, and that's when
 21 the consideration was put together. Then I passed
 22 that on to Jeff that we was able to -- you know, by
 23 letting this promissory note be relieved, we were
 24 able to get them to remove that phrase.
 25 Q. Did you know what the promissory note

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1 was all about?
 2 A. Did not.
 3 Q. Did you have any indication it was for
 4 nonpayment of rent or for rent deferral, so to speak?
 5 A. No, sir.
 6 Q. So that wasn't communicated to Needs?
 7 A. No.
 8 Q. Had you ever seen the specific note in
 9 question?
 10 A. No.
 11 Q. Have you ever seen it since?
 12 A. No.
 13 Q. The purchase and sale agreement
 14 essentially provides -- let's see here. The original
 15 purchase and sale agreement originally provided a
 16 closing date of no later than September 15th, '07.
 17 Is that correct?
 18 A. Correct.
 19 Q. Did the parties extend the closing date
 20 by mutual agreement?
 21 A. They did.
 22 Q. And the record would indicate that the
 23 transaction was actually closed on December 7th, '07.
 24 Would that be right or --
 25 A. Correct.

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1 Q. -- comport with your recollection?
 2 Do you remember any of the circumstances
 3 of delay or why there was a delay in closing?
 4 A. I think it was the time frame and
 5 getting the -- there was some improvements or some
 6 repairs that needed to be done. I can't say I can
 7 remember exactly everything.
 8 Q. Okay. Apparently --
 9 A. There was some time frame O'Sheas
 10 assumed the existing mortgage. I know that was part
 11 of the holdup.
 12 Q. And part of the holdup was the fact the
 13 securing of a lease estoppel certificate from the
 14 tenant too, correct?
 15 A. Correct.
 16 MR. ARMSTRONG: Objection, foundation.
 17 Q. BY MR. CROCKETT: Well, your previous
 18 testimony is you recall that the final lease estoppel
 19 certificate was October 17th, correct?
 20 A. Yeah.
 21 Q. And that would have been after the
 22 original closing date of September 15th?
 23 A. Uh-huh.
 24 MR. ARMSTRONG: Is that a yes?
 25 THE WITNESS: Yes. Yes.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE)
O'SHEA, Trustees of the Thomas)
and Anne O'Shea Trust u/d/t DATED) Consolidated
NOVEMBER 2, 1998, et al.,) Case No. CV-08-4025
 Plaintiffs,)
 vs.)
HIGH MARK DEVELOPMENT, LLC, an)
Idaho limited liability company,)
et al.,)
 Defendants.)
_____)

DEPOSITION OF JEFFREY L. NEEDS

TAKEN IN BOISE, IDAHO

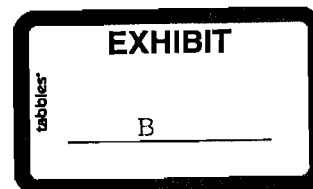
FEBRUARY 12, 2009

REPORTED BY:

SHERI LUDI KER FOOTE, CSR No. 90, RPR, CRR

Notary Public

1027



1 inside the business. And it was good to see that
2 there were -- they had children in the rooms.
3 They had several people out in the reception
4 area. It was a very busy business.

5 And the O'Sheas liked the idea of a
6 children's center type of business. And when we
7 went there it was good to see that, you know,
8 there were cars in the parking lot, lights were
9 on, and there was lots of children and clients in
10 there.

11 Q. All right. So, you were there for that
12 site inspection for less than an hour?

13 A. Correct.

14 Q. Did you ask anyone to be able to sit
15 down with the tenant or a tenant's representative
16 to talk about their business, their revenues?

17 A. We had asked to meet with Matt Smith
18 and we were told that he wouldn't be available to
19 meet with us. But I think we -- I was trying to
20 remember if we met with Marc Weinpel or not. No,
21 we didn't meet with anybody at that time.

22 Q. After that, when was the next time that
23 you visited the property?

24 A. I don't remember. I don't remember if
25 I went down again before the closing. I

1 remember, like I said, we sent the person to do
2 the inspection.

3 Q. Was that after you did your own site
4 inspection?

5 A. The date on the inspection is on that
6 flash drive I sent to you. You've got a copy of
7 the building inspection and the date. I think it
8 was September or October, but I -- somewhere in
9 that time frame, but I don't -- I don't know if
10 we went back down to the property again before
11 closing.

12 Q. Did you seek to meet with Matt Smith or
13 Marc Weinpel after that first site visit or site
14 inspection?

15 A. No.

16 Q. Did Mr. O'Shea?

17 A. I don't think so, but I don't know for
18 sure.

19 Q. Did you know the phone number for The
20 Children's Center?

21 A. We didn't look. I mean, we looked on
22 their website and stuff like that. So, it was
23 available. We knew where to get it.

24 Q. So, it was readily accessible?

25 A. Yes.

1 Q. So, you feel like a communication with
2 The Children's Center would have been readily
3 accessible or available?

4 A. Yeah, other than being told that, you
5 know, not to bother the tenant.

6 Q. But from your testimony, you were told
7 not to bother the tenant during your walk-through
8 because you didn't want to interrupt any
9 counseling that may have been going on. Is that
10 what you understood that to mean?

11 A. Yeah, and that Matt Smith wasn't
12 available for whatever reason.

13 Q. All right. On Tab 20, that second
14 page, did you prepare that document?

15 A. Yes.

16 Q. What is that?

17 A. Essentially it's a summary of the rent
18 based on what the lease said, and also putting in
19 there what the debt service was based on the
20 current loan on the building that was going to be
21 assumed, showing a cash flow and an expected
22 return on their investment.

23 Q. What did you look at to prepare this
24 document?

25 A. The lease and the deed of trust or the

1 note, but one of the instruments that showed what
2 the payment was for the mortgage on the building.
3 It's pretty simple. That was one of the nice
4 things about the building, it was a triple net
5 lease. So, here's their net payment. They take
6 care of all of the expenses on the property. So,
7 you take their lease rate, back out the debt
8 service. So, it's a pretty simple document.

9 Q. Anything else that you would have
10 looked at? Any financial information of The
11 Children's Center?

12 A. Not for this. This is purely taking
13 their rent and backing out their debt service and
14 here's their cash return.

15 Q. Up at the top there's a box that
16 states: "Residual Value." Do you see that?

17 A. Yes.

18 Q. And a "Residual Cap." Do you know what
19 that is?

20 A. Yes.

21 Q. What is that?

22 A. That's applying an expected cap rate at
23 some future point in time where you may want to
24 sell the building.

25 Q. Is that when you capped out of your

1 investment return or --

2 A. Yeah, different -- there's a lot of
3 different ways to look at it, but essentially,
4 you know, a cash on cash return is something that
5 you cash in and here you get back out, so your
6 cash on cash is easy to compute. But some people
7 like to see an internal rate of return. So, in
8 order to get an internal rate of return you've
9 got to have a residual value at some point in the
10 future. And so, we just delineated a 10-year
11 investment period if I remember right, and then
12 projected a cap rate in 10 years at 8-1/2 and
13 what the income would be at that time based on
14 the lease.

15 Q. So, at that cap rate, does that cap
16 rate in that residual value box, does that have
17 the same meaning as the cap rate that we looked
18 at on the LoopNet ad?

19 A. It's used for the same purpose.

20 Q. And why does yours reflect 8-1/2
21 percent and the one in the LoopNet ad reflect an
22 8 percent cap rate?

23 A. The cap rates during this time period
24 of the transaction were, given where the market
25 was, historically were low. And so, I just

1 computed a higher cap rate into the future to be
2 more conservative on a projection.

3 Q. So, what did you use to base that
4 increase or what did you base those assumptions
5 on to increase that to 8-1/2 percent?

6 A. Just my own intuition.

7 Q. You didn't consult any kind of a
8 periodical?

9 A. No.

10 Q. Did you consult any kind of real estate
11 appraiser or anybody like that that could give
12 you --

13 A. No.

14 Q. So, it was just a gut feeling as to
15 what the residual cap -- the cap rate would be?

16 A. Correct.

17 Q. I just want to make sure I'm clear.
18 That residual cap of 8-1/2 percent, is that the
19 same as a capitalization rate that we saw in the
20 LoopNet ad?

21 A. Yes.

22 Q. So, does that mean, 8-1/2, does that
23 mean that's better than an 8 percent cap rate,
24 more positive, meaning it's going to return more
25 on your money?

1 A. With capitalization rates, the higher
2 the rate, the -- as the capitalization rate
3 increases, the value of the property decreases.
4 As the capitalization rate decreases, the value
5 of the property increases.

6 Q. So, your investment improves as the cap
7 rate goes down?

8 A. Correct.

9 Q. And contrary wise, the investment gets
10 worse as the cap rate goes up?

11 A. Correct.

12 Q. Or loses value?

13 A. Yes. But again, it's a market
14 indicator and cap rates had been low over the
15 last couple of years.

16 Q. As a representative for Mr. O'Shea, how
17 much did you rely on that 8 percent cap rate that
18 was stated in that LoopNet ad?

19 A. Very little. I relied mostly on the
20 lease.

21 Q. When you say you relied on the lease,
22 are you talking about what was stated in the
23 lease agreement?

24 A. What's stated in the lease agreement,
25 the fact that the tenant we had been told was a

1 strong tenant, had been paying every monthly rent
2 on time, in a timely manner, had been a great
3 tenant. So, that had more weight than a cap
4 rate.

5 Q. Who told you that, that the tenant
6 was --

7 A. It was marked as that in the LoopNet
8 advertisement and we were told that by Paul Fife.

9 Q. When did Paul Fife tell you that?

10 A. At some point during the time when we
11 were looking at -- before closing.

12 Q. Would it have been prior to receiving
13 tax returns?

14 A. It could have been. I mean, I don't
15 remember how the timing went.

16 Q. How would he have told you that? Would
17 it have been over the phone or would it have been
18 in an e-mail?

19 A. A phone conversation.

20 Q. Okay.

21 A. We met with -- even with Tom O'Shea and
22 I, we did go down to Idaho Falls in September.
23 We also met with Paul Fife at that time and had
24 Paul go over with us the tenant, the history of
25 the tenant, and information like that.

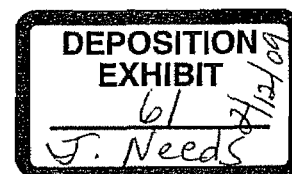
Children Center: Visit: April 2 & 3

Jeff Needs and Tom O Shea visited the building on Wed April 2nd and 3rd. Met with Greg Crockett on Thurs. 3rd and had an 11am. meeting on same day with Paul Fife at his office. Gordon Arave. Louis Crammell. Dan -- executives from Bingham Hospital were also present.

We asked open ended questions like what happened to the deal and lease that caused the building to be vacant all of a sudden? It was promoted and marketed as a great deal -- what happened? What could they do to help us re rent the place or mitigate our losses? Did they know any of this before the close of the deal? Etc etc.

When I asked Gordon if he had ever experienced any difficulties with Matt Smith he said that it was a total surprise to him and that Matt Smith had always paid the rent on time. He claimed he was also the victim in that Matt also had terminated his lease in Pocatello and that he had initiated a law suit against Matt. We asked him about the Dec rent and said that he had been out of town and was surprised when he came back to find that it had not been paid so he volunteered to pay it into escrow. I asked Paul Fife how he came up with the marketing materials and proformas and he responded that he got everything from Gordon. I asked Gordon if he knew the present whereabouts of Matt Smith and he responded that he did not. We informed him that he was now leasing another building in town with the name Children Center owned by Tim Marshall. He acted surprised and said he did not know Tim. I asked him if he owned other buildings in town and responded that he owned a few Senior assisted places in Ammon and in Idaho Falls. He said that his brothers and family had been in the business of development in the surrounding area for many years and that he sat on the board of Bingham (Memorial) hospital. I asked him if he had helped in removing Matts first right of refusal and he responded that he had given him consideration.

Louis Crammell and Dan made a presentation to us on the needs of a children center in Idaho Falls and how Matt had built up this business by hiring social workers and doctors to establish life long ties with these needy children. They maintained that if Matt were put out of business there would be a huge vacuum that would need to be filled by someone and that the Hospital may be interested in filling this need. He talked about the licensing laws and how they were tied to a specified building that requires a lengthy approval process and wondered if Matt had gone through this process when he moved. He promised us that he would find out more as well as put together some numbers and a business model for the Hospital or another business that may be interested in taking over a new Children Center. So far he has not contacted us except subsequently to say that the Hospital was not interested.



O'SHEA000329

Transcript of the Testimony of **Gordon Arave**

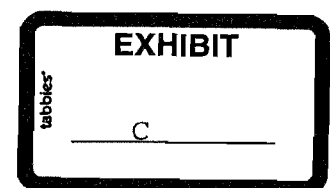
Date: January 29, 2009

Volume: I

Case: O'SHEA, ET AL v. HIGH MARK DEVELOPMENT

Printed On: December 15, 2009

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1 for the months of June, July, and August 2006 in
 2 accordance with that lease?
 3 A. I was never involved in collecting
 4 rent.
 5 Q. Okay. Who would have been involved in
 6 the collection of the rent on this property?
 7 A. Probably Scott Williams.
 8 Q. Now, who is Mr. Williams?
 9 A. He works -- he is a member of High
 10 Mark Development and he handles -- he does work in
 11 my office and does handle some rental properties
 12 for the various entities there.
 13 Q. Okay. And is he an accountant and
 14 kind of a bookkeeper, controller type?
 15 A. He's not actually an accountant. He
 16 has a degree in finance, business, and he does do
 17 that sort of thing, yes.
 18 Q. So may we presume that if somebody in
 19 your organization, High Mark, was in charge of
 20 collecting and keeping track of rents and all that,
 21 that it would have been Mr. Williams?
 22 A. It probably was.
 23 Q. It apparently wasn't you; is that
 24 right?
 25 A. I -- no. I was not.

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1 Q. You don't do that?
 2 A. No, not usually.
 3 Q. All right. Now, you were, apparently,
 4 the one that was responsible for listing the
 5 property with Mr. Fife, correct?
 6 A. I was.
 7 (Exhibit *-002 marked.)
 8 Q. BY MR. CROCKETT: I'm going to show
 9 you what's been marked Deposition Exhibit No. *-002
 10 and indicate to you that we took a previous
 11 deposition in this case from Paul Fife, your real
 12 estate agent, and he testified that this was an
 13 advertisement and promotion that he ran on your
 14 property at 1675 Curlew, Idaho Falls, and that this
 15 was an Internet based promotion and ad that, in
 16 fact, did prompt a response from Jeff Needs, a
 17 Realtor representing the O'Shea Family Trust.
 18 MR. ARMSTRONG: Objection. Foundation.
 19 Assumes facts.
 20 Q. BY MR. CROCKETT: Do you understand
 21 that? I'm just representing to you that's been the
 22 previous testimony of Mr. Fife.
 23 A. I accept that.
 24 Q. And do you know any information that
 25 would be contradictory to that?

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1 A. I do not.
 2 Q. Now, review the information provided
 3 in the advertising and promotion. Is that
 4 consistent with the facts existing as to that
 5 property at the time you listed it?
 6 A. It does look correct. It looks to me
 7 to be a 10-foot-square-foot discrepancy between
 8 this and something I read earlier.
 9 Q. 10-foot-square-foot, what do you mean
 10 by that?
 11 A. It says building size 20,000 square
 12 feet, and the previous one said 19,990, but I don't
 13 know where that came from.
 14 Q. You're referring to the lease?
 15 A. Yeah.
 16 Q. So that would be a 10-foot-square-foot
 17 -- yeah, you're right. The lease says 19,990 and
 18 this says 20-, right?
 19 A. Other than that it looks to be correct
 20 to me.
 21 Q. Do you know who would have provided
 22 the information that ended up in this promotion and
 23 in this ad?
 24 A. It could have been me. It may have
 25 been Scott. But I knew Paul Fife personally so I

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1 may have provided the information or answered
 2 verbally.
 3 Q. Could it also have been your son Ben?
 4 A. That's unlikely.
 5 Q. I see. I see. Why do you say that?
 6 A. Because he doesn't live here.
 7 Q. I see. Did he live here in -- this
 8 would have been June of '06?
 9 A. He did not.
 10 Q. Do you agree that you provided the
 11 information -- or somebody in your organization.
 12 You say it was likely you -- that there was a
 13 10-year lease with an option to renew and that it
 14 was a triple net lease?
 15 A. I'm sure that that lease was provided
 16 by someone in my office and if I had been asked, I
 17 would have answered that way, yes.
 18 Q. And do you agree with Mr. Fife's
 19 statement when he says, property description: Here
 20 is a great investment property with that hard to
 21 find 10-year, triple net lease?
 22 A. I do agree.
 23 Q. Do you believe that that statement
 24 would have been attractive to a prospective buyer?
 25 MR. ARMSTRONG: Objection. Foundation.

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1 Pepperwood Plaza, whatsoever.

2 Q. Okay. But Crestwood did at that point
3 in time, as per your letter that is -- you did have
4 this other building in Pocatello that was being
5 leased to The Children's Center, correct?

6 A. That's correct. We owned two
7 buildings, one in Idaho Falls -- that I was
8 affiliated with.

9 Q. The rent payments in Pocatello, were
10 they current as of April of '07, if you remember?

11 A. They were current.

12 Q. And, again, the records of those
13 payments, would those have been, again, with
14 Mr. Williams?

15 A. Mr. Williams would have had a record
16 of those, yes. I'm sure he would have.

17 Q. I'm not trying to trick anybody here,
18 Mr. Arave. I'm just trying to figure out if there
19 are records, where they might be and under whose
20 control they might be.

21 A. He would have those, I assume, here.
22 He could probably refer back to his books. I think
23 he could provide those.

24 Q. All right. Do you recall entering
25 into a purchase and sale agreement with the O'Shea

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1 signed a note indicating that rent had been, quote,
2 deferred, unquote, for the period September '06
3 through January '07; isn't that correct?

4 A. I would say that a better word is that
5 it was restructured.

6 Q. Okay. The note makes reference to the
7 word deferred though. Don't you agree?

8 A. I don't remember but restructuring is
9 what we did. We restructured how Mr. Smith paid us
10 rent.

11 Q. Is it fair to say that on August the
12 14th, 2007, that that note was still outstanding
13 and unpaid?

14 A. It's fair to say that he was making
15 monthly payments on that note as per the terms of
16 the note that you just showed me.

17 Q. And are you sure about that?

18 A. I'm pretty sure. I -- again, I
19 repeat, I didn't collect the rent, but I am not
20 aware of anyone saying to me that he was deficient
21 in any way at that time.

22 Q. If you recall, when you reviewed that
23 note the payments are to come to Gordon Arave and
24 Jared Arave individually. Do you recall that we
25 reviewed that?

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1 Family Trust for the purchase and sale of the
2 building at 1675 Curlew by agreement dated August
3 the 9th, 2007?

4 A. I don't remember the date but I do
5 remember O'Shea Family Trust.

6 Q. I'm just going to show you the
7 document and see if you can recall. I'd suggest to
8 you this would, I think, purport to be a copy of
9 the agreement and it looks like to me you signed it
10 on August the 14th. Tell me if that's correct.

11 A. It looks to me to be the document that
12 I signed. That's correct.

13 Q. And would the day be correct? You
14 signed the agreement on August the 14th --

15 A. I assume so.

16 Q. On August the 14th was The Children's
17 Center, Incorporated, current on the lease and rent
18 payments at 1675 Curlew?

19 A. I believe so. They made -- they were
20 making all of their payments at that time, as near
21 as I can remember. Again, I don't collect the
22 rent. I don't personally handle that, but I am not
23 aware of them being deficient on any of our
24 agreement at that time.

25 Q. But you had on April the 18th, '07,

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1 A. We did.

2 Q. So may I presume that any payments
3 that were made pursuant to that note came to you
4 individually?

5 A. I would think that they came to either
6 myself or Jared, yes.

7 Q. And who would have the records of
8 those payments?

9 A. Jared would have a record of that.

10 Q. And where is Jared?

11 A. He lives in Blackfoot.

12 Q. And where is his office?

13 A. He has an office at 1395 Northwest
14 Main.

15 Q. Your principal place of business?

16 A. That's correct.

17 Q. Would records of those payments be
18 with Jared at that location?

19 A. I believe so.

20 Q. You don't have an independent
21 recollection as to the status of those note
22 payments as of August the 14th, '07?

23 A. Not for sure, but I'm pretty sure that
24 he was absolutely current.

25 Q. Absolutely current?

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1 objection because she can't take us down talking at
2 the same time, so just wait.

3 Q. BY MR. CROCKETT: And if you have an
4 opinion or if you know.

5 A. I don't know.

6 (Exhibit *-008 marked.)

7 Q. BY MR. CROCKETT: Let me show you
8 what's been marked as Exhibit *-008. Can you
9 identify the document?

10 MR. ARMSTRONG: Do you have a copy for me?

11 MR. CROCKETT: I'm sorry. I do.

12 MR. ARMSTRONG: Thanks.

13 THE WITNESS: It looks like to me that it's
14 a letter written to Mr. Fife and signed by Richard
15 Armstrong.

16 Q. BY MR. CROCKETT: And it says a copy
17 went to the client. Are you the client?

18 A. High Mark Development is the client.

19 Q. Okay. But, again, my question was --
20 as I recall your answer was Mr. Armstrong is
21 principally dealing with you, Gordon Arave, with
22 respect to this transaction?

23 MR. ARMSTRONG: Objection. Misstates the
24 evidence. Assumes facts.

25 THE WITNESS: I would have totally deferred

1 Center, Incorporated, for the property at 1675
2 Curlew?

3 A. Again, I repeat, I did not handle the
4 money, but I believe it was. I certainly do not
5 recall anyone telling me otherwise.

6 (Exhibit *-009 marked.)

7 Q. BY MR. CROCKETT: I'm showing you
8 what's been marked as Deposition Exhibit No. *-009.
9 Can you identify the document?

10 A. Looks like to me that was prepared by
11 Scott Williams. Looks like to me that his intent
12 was to have separate accountings of the cam charges
13 versus the monthly rent.

14 Q. And do you agree that he was writing
15 this on behalf of Crestwood Enterprises and High
16 Mark Development?

17 A. Looks to be that way. He handled the
18 rent collection for both entities and that's what
19 it says.

20 Q. Just based on the numbers, don't you
21 believe the numbers when it says High Mark
22 Development would be related to the property at
23 1975 Curlew?

24 MR. ARMSTRONG: Objection, misstates the
25 evidence. It's 1675.

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1 to Mr. Armstrong when it came to a lease estoppel
2 certificate. I would have asked him the questions,
3 not vice versa.

4 Q. BY MR. CROCKETT: So it's fair to say
5 you relied on him totally?

6 A. I did.

7 Q. And he was authorized to act in your
8 behalf?

9 A. He was.

10 Q. And do you recall throughout the
11 transaction whether or not Mr. Armstrong did
12 anything that he was not authorized to do?

13 A. I don't believe he did.

14 Q. You were fully satisfied with his
15 services?

16 A. I was.

17 Q. And do you agree this purports to be a
18 letter dated September 28th, 2007, to your real
19 estate agent, Paul Fife?

20 A. Where's the date? Yeah, that's
21 correct, September 28th, 2007.

22 Q. Let me just ask you, do you know or
23 have any recollection whether on that date,
24 September 28th, '07, whether or not rent was paid
25 current to High Mark Development by The Children's

1 Q. BY MR. CROCKETT: I'm sorry. 1675.
2 A. 1675.

3 Q. The record will indicate that the
4 subject property is at 1675 Curlew.

5 A. That's what I would think this is,
6 yes.

7 Q. And do you also agree that the other
8 entry for Crestwood Enterprises would have had
9 specifically to do with the professional office
10 building that you leased to The Children's Center
11 in Pocatello?

12 A. I believe so, yes.

13 Q. It wouldn't relate to any other
14 property, would it?

15 A. No. I have none other down there.
16 (Exhibit *-010 marked.)

17 Q. BY MR. CROCKETT: Handing you what's
18 been marked as Deposition Exhibit No. *-010. Do
19 you recognize the document?

20 A. Can't say as I do, but --

21 Q. It comes from your office though,
22 doesn't it, don't you agree?

23 MR. ARMSTRONG: Objection, foundation.

24 Q. BY MR. CROCKETT: Doesn't the top of
25 the fax indicate that it was faxed --

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1 A. It says that it was faxed from my
2 office.
3 Q. Okay. You don't know who prepared it?
4 A. I don't remember the document but what
5 is it? Let's see. I'm not familiar with this, but
6 I can't say anything more. It looks like it was
7 faxed from Arave Construction -- from the Arave
8 Construction office, yes.
9 Q. You just don't know who prepared it?
10 A. I do not.
11 Q. I'll represent to you that it went to
12 your real estate agent, Paul Fife, and he provided
13 this. Do you know to the contrary?
14 A. No, I don't know. That could be true.
15 It probably is true.
16 Q. And do you recognize the first line
17 says, rent received, 6-26 through 7-27-07 -- I'm
18 sorry -- 6-2006 through 7-2007 of \$324,836?
19 A. That's what it says.
20 Q. If that relates to the rent from The
21 Children's Center to High Mark Development, do you
22 agree with me it would have to also -- that number
23 would also have to include the rent represented by
24 the deferral note?
25 MR. ARMSTRONG: Objection. Foundation.

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1 Calls for speculation.
2 THE WITNESS: I don't know where that came
3 from.
4 MR. ARMSTRONG: Can you answer his
5 question?
6 THE WITNESS: I can't. I don't know.
7 Q. BY MR. CROCKETT: Can you do the math?
8 A. Well, I could if you have a
9 calculator. Give me a calculator.
10 MR. ARMSTRONG: It's not your obligation.
11 Wait for the next question.
12 Q. BY MR. CROCKETT: You would recognize
13 that that would purport to represent that over a
14 13 month period of time that the rent was 324,836?
15 A. It says 13 months and, obviously, rent
16 was given to The Children's Center -- or excuse
17 me -- to High Mark to make the mortgage payments
18 with. We've discussed the -- we've discussed the
19 restructuring and the note payments and so on, but
20 the money still had to come in to High Mark to make
21 those payments with.
22 Q. Okay. Thank you.
23 (Exhibit *-011 marked.)
24 Q. BY MR. CROCKETT: Showing you what's
25 been marked Exhibit No. *-011. Do you recognize

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1 the document?
2 A. Again, I do not. It's something that
3 looks to me that Scott prepared.
4 Q. I know it looks like it was faxed.
5 again, from Arave Construction; do you agree?
6 A. It is.
7 Q. Signed by Scott Williams?
8 A. It looks like it is.
9 Q. Do you recognize his signature?
10 A. That looks like his signature, yes.
11 Q. And do you agree with me that it
12 appears to be a demand -- simply a Dunner letter or
13 a collection letter sent to The Children's Center?
14 MR. ARMSTRONG: Objection. Calls for a
15 legal conclusion. Foundation. Calls for
16 speculation.
17 THE WITNESS: I don't know. Obviously, you
18 can read the words. October the 8th, so I don't
19 know what day or what this represents, but Scott
20 was in charge of collecting the rent and making the
21 payments, so the letter speaks for itself.
22 MR. CROCKETT: Okay. Thank you.
23 (Exhibit *-012 marked.)
24 Q. BY MR. CROCKETT: Showing you what's
25 been marked as Deposition Exhibit No. *-012. Would

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1 you agree that it appears to be an e-mail with an
2 attached letter from your counsel, Mr. Armstrong,
3 directed to Mark J. Weinpel, Esquire, under a date
4 of September 18th, 2007?
5 A. I do kind of remember some of this,
6 yes. Question?
7 Q. The letter on page 1 at the bottom,
8 the last two sentences says in part, quote, I
9 indicated to you in a later discussion, however,
10 that my client is willing to explore options
11 related to the Pocatello building in order to
12 relieve some of the economic pressures your client
13 may be experiencing. My clients have been engaged
14 in such efforts since that time, unquote. Do you
15 agree that's what the letter says?
16 A. Where are you reading?
17 Q. I'm reading the last two -- last three
18 lines.
19 A. I indicated to you in a later
20 discussion that my client is willing to -- that's
21 what it says.
22 Q. Do you know what Mr. Armstrong was
23 making reference to when he talks about exploring
24 options to relieve your economic pressures?
25 A. All that I know is I recall that they

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1 MR. CROCKETT: I'm sorry. Did I misread
2 that, Counsel?
3 MR. ARMSTRONG: You just left out
4 Pocatello. You're fine.
5 THE WITNESS: Where were you reading?
6 Q. BY MR. CROCKETT: Well, I'm reading
7 from the letter again.
8 A. That's correct. The note that was
9 forgiven was to release options on both buildings.
10 That's correct. I'd forgotten that.
11 Q. And the note they're talking about is
12 the note they signed for deferred rent back in
13 April '07, correct?
14 A. That's correct. That was the
15 agreement that was struck was to forgive that note
16 in order to release those two clauses, which were
17 apparently a problem for the buyer.
18 (Exhibit *-019 marked.)
19 Q. BY MR. CROCKETT: Handing you what's
20 been marked as Exhibit *-019. Mr. Arave, do you
21 agree with me that that appears to be a printout of
22 e-mails exchanged between your counsel,
23 Mr. Armstrong, and counsel for The Children's
24 Center, Mr. Weinpel, dated October 24th and October
25 26th, 2007?

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1 A. That's what it says.
2 Q. Do you agree in the second paragraph
3 of the October 24th, 2007, it says, my client also
4 wanted me to follow up on a memo you and Tara
5 Hanson sent to High Mark about the Idaho Falls
6 rent. Can you give me some indication as to when
7 High Mark will receive the rent and cam payment for
8 October. I believe there have also been three
9 interest payments due on the M. Smith Enterprise's
10 note dated October 1, 2005. Will you let me know
11 when the payee can expect to receive these interest
12 amounts. If these payments are ready, please let
13 me know and I will notify Scott Williams to
14 retrieve those from you. Is that what it says?
15 A. It says that, yes.
16 Q. Would you understand from that that at
17 that point in time there continues to be a
18 delinquency in the payment of rent for October?
19 A. The rent would have been delinquent by
20 the 15th. We talked about that earlier. This is
21 dated October the 24th, so apparently at least
22 for -- what's the 15th -- nine days, it was nine
23 days late at that point. The rent on those
24 interest payments to me personally, the note
25 payment that it's referring to, I don't remember.

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1 I had remembered him having paid those up until
2 late in that year and then he ceased to pay them
3 right at the end of the year.
4 Q. Do you know when the estoppel
5 certificate was provided on to either Mr. Needs or
6 the O'Shea Family Trust, your buyers?
7 A. Repeat that again.
8 Q. Do you know when the estoppel
9 certificate signed on the 18th of October was
10 provided to your buyers?
11 A. I really was not involved in that. I
12 don't know.
13 Q. So that may have been provided by your
14 attorney?
15 A. It was provided -- I assume that it
16 was provided by him or by someone from -- it was
17 actually signed by Matt Smith. So I don't know --
18 I don't know how that was structured.
19 Q. If Mr. Armstrong transferred it on to
20 Mr. Fife, I presume Mr. Fife thereupon would have
21 been still acting as your agent, correct?
22 A. He was acting as my agent through this
23 transaction, or our agent.
24 Q. And would he have been authorized on
25 your behalf to convey or deliver the estoppel

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1 certificate to your buyers and their agent,
2 Mr. Needs?
3 A. He would have been the party that all
4 things were communicated to for that purpose, yes.
5 Q. So he was authorized to do that?
6 A. He -- yes, I guess.
7 (Exhibit *-020 marked.)
8 Q. BY MR. CROCKETT: Showing you what's
9 been marked as Deposition Exhibit *-020. One more
10 time, would you agree with me that appears to be
11 the printout of an e-mail from your counsel,
12 Mr. Armstrong, to Mark Weinpel dated November 5th,
13 2007?
14 A. Appears to me that there was a problem
15 at that point.
16 Q. And we're still talking about payment
17 of the October rent; is that right?
18 A. It looks like it is.
19 Q. Okay. Thank you.
20 A. Now, this was scheduled to close, to
21 my recollection, November 1st or 2nd, so --
22 initially, and then it got moved back a month.
23 Q. Well, the fact is you signed an
24 addendum --
25 A. Yeah.

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1 interest or have an interest in which you've
2 offered these deferred rent arrangements?

3 A. That's not unusual for a building that
4 we're building because we can build into our total
5 cost some cost for the interest expense for six
6 months.

7 Q. Now, I understand you could forgive
8 rent for six months. I'm asking about these
9 situations where you really haven't forgiven rent,
10 you've just simply accepted promissory notes for
11 deferred rent. Have you done that with anybody
12 other than Smith?

13 A. Probably. I don't know that I can be
14 specific now, but I've probably -- when you're
15 dealing in this business and you're dealing with
16 rent collection, you do whatever you can to make
17 sure that people are successful.

18 Q. Do you ever remember passing on any
19 information to your Realtor, Paul Fife, about these
20 rent deferrals or the failure to pay rent for
21 October, November, or December of 2007?

22 A. I don't remember ever having had any
23 discussion either way in that regard. I may have
24 done. I don't remember that.

25 Q. You don't remember it; is that

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1 correct?

2 A. No. The other leases specifically --
3 and Mr. Fife was privy to the information on the
4 lease in Pocatello -- very specifically stated that
5 there were six months of no rental obligation.

6 Q. Okay. That was just --

7 A. For six months.

8 Q. But, in fairness, that's just a
9 forgiveness of rent?

10 A. No -- well, that's a -- that's six
11 months no rent payment. You live there for six
12 months and then you start paying rent. That was
13 built into the original agreement. It was not done
14 so in this case until after the fact.

15 Q. That's right. After they had failed
16 to pay you, did you then give them these deferred
17 rent opportunities?

18 A. No. Mr. Smith came to me. He was
19 current on the rent at the time that he approached
20 us. He asked us if we would then put into effect
21 what we had done on the previous two buildings. I
22 said no. We made an agreement. You signed a
23 contract. I will not give you six months of no
24 rent payment. He then suggested that he sign a
25 note and at least spread that cost over a longer

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1 period of time to allow him some tolerance in what
2 he was doing in order to get his business ramped
3 up.

4 Q. But you would recognize and agree with
5 me, wouldn't you, that by the documents, that was
6 only done after the fact?

7 A. Well, it was done at the time that he
8 -- he had paid the rent up to that time. He came
9 to us, asked us then for a six-month reprieve, or
10 whatever the proper terminology is here. We signed
11 it and agreed to it and he complied with that.

12 Q. Well, Mr. Arave, you will agree with
13 me that the note signed by Mr. Smith on behalf of
14 The Children's Center was dated April the 18th,
15 2007?

16 A. That's right.

17 Q. And forgave rent or provided for the
18 deferred payment of rent for the period of
19 September '06 through January of '07?

20 A. The deal was made in September, not in
21 April. He came to us in September or October,
22 whenever that date was, and said, I'm not going to
23 be able -- I have a problem with my cash flow. The
24 note then began on April -- began in April, but it
25 was signed -- the agreement was made back when he

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1 came to me and negotiated the deal.

2 The note is signed the day that the
3 rent was due, not after he didn't pay rent. He
4 came and negotiated that with us. He was
5 complaining about having problems with his cash
6 flow, psychiatrists, that sort of thing, as I
7 recall, and negotiated the deal with us to begin
8 payments of rent in April for the previous six
9 months or five months or whatever the time frame
10 is.

11 Q. Let's go back and have you look at
12 Exhibit *-006, which is the note. Up in the upper
13 left-hand corner it says, date of the note, April
14 16th, 2007?

15 A. It does. That's when the note began.
16 That's when he started making payments.

17 Q. When was it signed?

18 A. 4-18-07.

19 Q. Same day, right?

20 A. Yeah. In fact, I didn't sign it until
21 it looks to me May the -- I don't know what it
22 says.

23 All I know is that he came to us and
24 asked for a six-month reprieve. We didn't wait six
25 months before we did anything. We had agreed on a

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1 deal that he was to get six months off. We then
2 came up with the money to make the payments during
3 that period of time as agreed with him.

4 Q. And the period of time, according to
5 this, would have been September '06 through January
6 of '07, correct?

7 A. That makes sense, and then he then had
8 agreed that he would start making payments on that
9 deferred rent on or about the 1st of April or
10 whatever this says, April the 18th. But we
11 certainly had an agreement in place prior to this
12 occurring. I'll make that clear. He didn't get
13 delinquent and then --

14 Q. Did you ever tell that -- did you ever
15 tell Fife about that arrangement?

16 A. I don't remember. I don't remember
17 whether we ever discussed it or not.

18 Q. Did you ever show Fife that note?

19 A. Well, I don't know. I think it was
20 all this -- all in everything that we provided, but
21 I certainly wasn't trying to protect it in any way.
22 It was clear.

23 Q. Mr. Weinpel would indicate that there
24 was a time in September 2007 when he simply
25 informed you guys, meaning you, I don't know about

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1 your sons, and maybe Mr. Williams or maybe all of
2 the above that The Children's Center was no longer
3 able to pay the rent.

4 MR. ARMSTRONG: Objection, foundation.

5 THE WITNESS: I've never spoke to

6 Mr. Weinpel in my life. Never spoke to the man.

7 Q. BY MR. CROCKETT: Okay. And you
8 don't -- do you recall ever having heard anything
9 to that effect?

10 A. Absolutely not. In fact, I thought
11 that if there was any danger that it was that they
12 would leave Pocatello because they were anxious to
13 centralize their business in Idaho Falls, Idaho,
14 not in Pocatello. I was much more concerned about
15 Pocatello than Idaho Falls.

16 Q. Did you have any reason to believe
17 that The Children's Center, Incorporated, was in
18 financial distress when you signed a purchase and
19 sale agreement with the O'Shea group on August the
20 14th, 2007?

21 A. No. Matt --

22 Q. That answers my question. Isn't it
23 true that much of these obligations we've referred
24 to are still delinquent and unpaid as of today?

25 MR. ARMSTRONG: Objection. Calls for a

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1 legal conclusion. Foundation. Assumes facts.

2 THE WITNESS: We've discussed that. You
3 know the answers to that.

4 Q. BY MR. CROCKETT: And what is the
5 answer?

6 A. Well, obviously, the only note that
7 wasn't paid -- that was not met that wasn't totally
8 restructured or agreed upon appears to me in this
9 discussion to have been November and December of
10 2007 and some delinquent taxes.

11 Q. And our total would included October
12 then, I presume.

13 A. Maybe I'm wrong. Maybe it was
14 October.

15 Q. You signed a note for October --

16 A. October and November and December.

17 Q. To your knowledge was that information
18 ever conveyed on to anybody with the O'Shea group
19 or any representative of the O'Shea group?

20 MR. ARMSTRONG: Objection, foundation.

21 THE WITNESS: I don't know whether that was
22 in the financials provided by The Children's Center
23 or not. I was not privy to that information. It
24 went directly from them to --

25 Q. BY MR. CROCKETT: I'm talking about

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1 you or anybody on behalf of High Mark. Did you
2 personally --

3 A. I did not.

4 Q. -- ever do any -- convey any of that
5 information on to the O'Shea group or any
6 representative of the O'Shea group?

7 A. I did not personally, no.

8 Q. Do you know if anybody with your
9 organization did that?

10 A. I do not know.

11 MR. CROCKETT: Let's take a break.

12 (A recess was taken from 3:44 p.m. to
13 3:50 p.m.)

14 (Scott Williams joined the
15 deposition.)

16 Q. BY MR. CROCKETT: Back on the record.
17 Mr. Arave, I just want to go back and ask you --
18 again, I'm going to hand you back Deposition
19 Exhibit No. *-015. I think you previously
20 testified that that was an agreement reached
21 between High Mark and you and Jared Arave and The
22 Children's Center, Inc., and M. Smith Enterprises,
23 correct?

24 A. That's correct.

25 Q. Were any of the terms of this



HOPKINS RODEN CROCKETT HANSEN & HOOPES, PLLC
SEWARD H. FRENCH (1941-1984) TED C. SPRINGER (1943-1984) WILLIS B. BENJAMIN (1939-1990)

October 3, 2008

GREGORY L. CROCKETT
E-MAIL: gregcrockett@hopkinsroden.com

Richard J. Armstrong, Esq.
Wood Crapo LLC
500 Eagle Gate Tower
60 East South Temple, Suite 500
Salt Lake City, Utah 84111

Re: Thomas O'Shea, et al. vs. High Mark Development, LLC, et al
Bonneville County Case No. CV-08-4025

Dear Rick:

Acting in accord with Idaho case law on rescission, Plaintiffs in this matter hereby offer to restore the Defendants to their status quo by returning the property at 1675 Curlew Drive, Ammon, Idaho 83406. Rescission of a contract is available when one of the parties has committed a material breach which destroys the entire object of entering into the contract and which touches the fundamental purpose of the contract. *First Security Bank of Idaho v. Murphy*, 131 Idaho 787, 792, 964 P.2d 654 (1998). A party seeking to rescind a transaction on the ground of fraud must restore or offer to restore the other party to the status quo before the contract was formed. *Watson v. Weick*, 141 Idaho 500, 507, 112 P.3d 788 (2005). The party desiring to rescind a contract must, prior to rescinding, tender back to the other party any consideration or benefit received under the contract by the rescinding party. *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 180-81, 45 P.3d 829 (2002). The party must exhibit an actual intent and willingness to pay to constitute a valid tender. *Pollard Oil Co. v. Christenson*, 103 Idaho 110, 116, 645 P.2d 344 (1982).

Accordingly, Plaintiffs hereby tender the Ammon property to Defendants in order to completely restore the parties' to their respective pre-contract positions. Tender of the property is conditioned on the payment of all sums and amounts expended by the Plaintiffs in conjunction with the transaction. This constitutes our tender of all

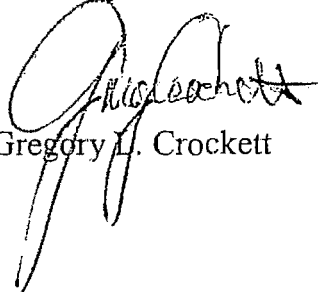
Richard J. Armstrong, Esq.
October 3, 2008
Page 2 of 2

consideration related to the transaction by appropriate instrument of conveyance. This offer is made with the intent that the parties' contract of sale be rescinded due to Defendants' failure to inform the Plaintiffs that the tenant, The Children's Center, Inc., was not paying its monthly rent. Plaintiffs will dismiss the Complaint against the Defendants in return for acceptance of this offer.

The representations made in the estoppel certificate as to the payment of rent were patently false, and were material in that Plaintiffs would not have purchased the property were it not for those false representations. Contrary to Mr. Armstrong's statement in Court, Plaintiffs had no knowledge of or reason to believe that The Children's Center was not paying rent, and in fact had every reason to believe to the contrary. The "balance sheet" provided to Plaintiff's counsel at the deposition of Paul Fife makes absolutely no representation as to The Children's Center's complete non-payment of rent, and merely shows that The Children's Center was indebted for a certain amount to Jared and Gordon Arave for any of a number of unknown and undisclosed reasons. From Plaintiffs' perception, this debt could have been for any number of legitimate reasons, but the estoppel certificate reasonably led Plaintiffs to believe that the debt was not due to unpaid rent.

This offer will be open for acceptance for ten (10) days from the date of this letter. Otherwise, we fully intend to continue litigating this matter.

Sincerely,



Gregory L. Crockett

GLC/tlt
cc: Mr. Tom O'Shea
Mr. Jeff Needs
Michael Shiffman, Esq.

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

---oOo---

THOMAS O'SHEA and ANNE DONAHUE O'SHEA,
Trustees of the Thomas and Anne O'Shea Trust
u/d/t DATED NOVEMBER 2, 1998; GRANDVIEW
CREDIT, LLC, a California limited liability
company; CALEB FOOT, an individual, KATE
LARKIN DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN FRANCISCO
RESIDENCE CLUB, INC., a California
corporation,

Plaintiffs,

vs.

CASE NO.
CV-08-4025

HIGH MARK DEVELOPMENT, LLC, and Idaho limited
liability company; GORDON ARAVE, individually
and as Officer of High Mark Development, LLC;
BENJAMIN D. ARAVE, individually and as
Officer of High Mark Development,

Defendants.

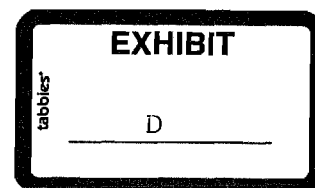
DEPOSITION OF ANNE DONAHUE O'SHEA

July 9, 2009

---oOo---

Ref. No. 23341

Reported by: LAURA AXELSEN, CSR NO. 6173
RMR, CRP, CLR



1041

1 You scanned the deposition --
 2 A. That's what I did.
 3 Q. Prior to scanning it, had you read it before
 4 that?
 5 A. No.
 6 Q. Okay. You reviewed some e-mails, correct?
 7 A. Yes.
 8 Q. What e-mails do you remember?
 9 A. The LoopNet listing from Jeff Needs.
 10 Q. That was in an e-mail?
 11 A. Yes.
 12 Q. Any others?
 13 A. I think there was -- LoopNet listing. I think
 14 something with the estoppel on it.
 15 Q. So you reviewed an estoppel certificate?
 16 A. It was something talking about the estoppel.
 17 Yes. Yes, it had the estoppel certificate. And something
 18 about the expenses, income and expenses of us as a group.
 19 Q. Is there any particular reason why you reviewed
 20 those three items?
 21 A. No.
 22 Q. Were you asked to review those?
 23 A. No.
 24 Q. Okay. Did you meet with Mr. Shiffman prior to
 25 coming to your deposition today?

1 A. Yes.
 2 Q. Okay. And you met with him?
 3 A. Yes.
 4 Q. And how long was that meeting?
 5 A. About 20 minutes, half-hour, I guess. About a
 6 half-hour.
 7 Q. Was that today or yesterday?
 8 A. Yes.
 9 Q. Today?
 10 A. Today.
 11 Q. Did you meet with anybody else?
 12 A. My brother was with us.
 13 Q. And you're motioning to your brother, Kevin?
 14 A. Yes.
 15 Q. Okay. And he was in that meeting as well?
 16 A. Yes.
 17 Q. Anything else that you did to prepare for your
 18 deposition?
 19 A. No.
 20 Q. Have you talked with your husband about his
 21 deposition?
 22 A. A little bit.
 23 Q. Okay. When did you discuss that with him?
 24 A. Probably the only time was on the phone that
 25 night after his deposition.

1 Q. The night of his deposition?
 2 A. Yes.
 3 Q. Okay. Give me your fullest recollection of that
 4 discussion.
 5 A. It was a long day, lot of questions. Glad it
 6 was over. I don't recall anything else specific.
 7 Q. We're just going to kind of go through some of
 8 the ground rules for giving a deposition. You're an
 9 attorney, correct?
 10 A. Yes.
 11 Q. You understand what a deposition is?
 12 A. Yes.
 13 Q. What the purpose of a deposition is?
 14 A. Yes.
 15 Q. You've been put under oath to testify just as if
 16 you were sitting in court?
 17 A. Yes.
 18 Q. The only difference is we don't have a judge
 19 here to make any kind of ruling on objections that
 20 Mr. Shiffman may or may not make?
 21 A. Yes.
 22 Q. The court reporter is taking down everything you
 23 and I say, as you know. Our responses need to be verbal.
 24 My questions need to be clear. If you don't understand a
 25 question, you need to ask me to either restate it or have

1 it read back to you.
 2 We need to try to avoid head nods and uh-huhs
 3 and uh-uhs because those can't get picked up by the court
 4 reporter very easily. We want to make sure the record is
 5 clear as possible.
 6 So if you can remember that as we go through
 7 proceedings today --
 8 A. Okay.
 9 Q. -- I would appreciate it. Are you under the
 10 influence of any drug or alcohol or anything that would
 11 impair your ability to recall events?
 12 A. No.
 13 Q. Okay. Back when you received your J.D. from the
 14 University of San Francisco -- I want to go back to that
 15 time. You said you received that degree in 1986?
 16 A. Yes.
 17 Q. What did you do upon graduating?
 18 A. I took the bar exam.
 19 Q. And then who was your first employer out of law
 20 school?
 21 A. Alameda County District Attorney's office.
 22 Q. And were you a prosecutor?
 23 A. Yes.
 24 Q. And how long did you hold that position?
 25 A. Uhm, 1986 until 1998. I may have said '96. I

1 information that was not accurate. So that inaccurate
2 information gave us a warm fuzzy.

3 Q. Okay. But --

4 A. If you wanted to call it that.

5 Q. You've not included the estoppel in that list of
6 actual documents that you had -- that you reviewed prior
7 to closing?

8 A. But I did discuss that earlier today, that we
9 talked about it.

10 Q. You -- did you actually have the estoppel in
11 front of you? Did you actually --

12 A. As some point I did look to the estoppel.

13 Q. Prior to closing?

14 A. Either I looked at it before closing or we
15 discussed it.

16 Q. Okay. So you don't know whether or not that
17 would be one of these tangible pieces of paper that you
18 had -- that you reviewed or relied on prior to closing?

19 A. Yeah, I think it probably was. I know we had a
20 discussion about it. So I probably did look at it.
21 Either I looked at it or we discussed it, my husband and
22 I.

23 Q. Okay. What was it about the estoppel that
24 boosted you or assisted you or facilitated your reliance?

25 A. It's just the confirmation of representations

1 investing in Huntsville, Alabama; is that correct?

2 A. Yes. We were still investing in
3 Huntsville, Alabama at that time.

4 Q. Okay. In fact, from the Complaint, it looks
5 like there were quite a few visits to the properties
6 there --

7 A. From what Complaint and what properties are you
8 talking about?

9 Q. In the Alabama Complaints. I mean, we're
10 talking about -- I just want to get kind of a general time
11 period of -- there were trips made to Alabama.

12 A. By me?

13 Q. Either you or Tom or other investors in those
14 Alabama properties.

15 A. Yes, there were trips made.

16 Q. Okay. By you?

17 A. One by me.

18 Q. Okay. Do you recall when that trip was?

19 A. Yes.

20 Q. When was it?

21 A. September of '07.

22 Q. Do you have a specific date in mind?

23 A. Maybe around the 9th, something like that.

24 Q. Okay. And the purpose of your visit in
25 September, 2007?

1 that, you know, yes, this is the tenant; yes, they have a
2 lease; yes, the lease is in full force; yes, they're --
3 you know, there are no defaults; yes, they're paying the
4 rent. That kind of thing.

5 Q. Okay.

6 (EXHIBIT 9 WAS MARKED FOR IDENTIFICATION.)

7 MR. ARMSTRONG: Q. Handing you what's been
8 marked as Exhibit 9 to your deposition, do you recognize
9 that document?

10 A. Yes.

11 Q. What is it?

12 A. A Complaint. My -- those of us who bought the
13 property in Curlew against High Mark Development and the
14 Araves.

15 Q. Okay. Did you review this Complaint before it
16 was filed?

17 A. No.

18 Q. If you'll turn -- I guess it would be Exhibit D
19 to the Complaint. What is that document?

20 A. Lease estoppel certificate.

21 Q. And do you recall ever seeing this document
22 before prior to closing?

23 A. I think I did. As I said, I think I did or we
24 at least talked built.

25 Q. It was around the same time that you were

1 A. To see Huntsville, Alabama.

2 Q. Was it to look at the properties you were
3 buying?

4 A. Looked at the properties, meet with
5 Scott McDermott, Roy Claytor, Bill Chapman.

6 Q. Okay. And so roughly a month after that this
7 lease estoppel certificate is signed by the tenant?

8 A. Yes.

9 Q. Do you know who wrote the lease estoppel
10 certificate?

11 A. No.

12 Q. Do you have any evidence one way or the other as
13 to who was responsible for putting it together?

14 A. No.

15 Q. Okay. Do you know if your attorney,
16 Mr. Shiffman, wrote it?

17 A. No.

18 Q. Or wrote aspects of it?

19 A. I don't know.

20 Q. Okay. Do you feel that the estoppel certificate
21 that you're looking at in Exhibit D to the Complaint,
22 which has been marked as Exhibit 9 to your deposition,
23 that that relieved you or any of the other investors of
24 independently reviewing financial information related to
25 the Children's Center?

Transcript of the Testimony of **Kevin Donahue**

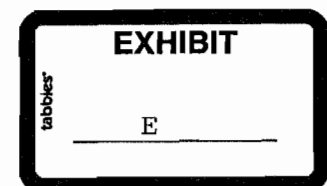
Date: September 24, 2009

Volume: I

Case: O'SHEA, ET AL v. HIGH MARK DEVELOPM

Printed On: December 15, 2009

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1 Q. And you also reviewed notes that you
2 had with your counsel.
3 A. Yes.
4 Q. Okay. As well as some financial notes
5 that you took.
6 A. Yes.
7 Q. Okay. I'm going to ask you again:
8 Based on what you've reviewed and what you know
9 about this case, what information did you rely on
10 that you believe was provided by Benjamin Arave?
11 A. I don't know what specifically he
12 provided, but the listing information, the
13 financial information, the Estoppel information
14 that was relied on; whatever his participation
15 was in that, I relied on.
16 Q. Do you have any personal knowledge of
17 your own as to whether that information was
18 provided by Benjamin Arave?
19 A. I don't recall what -- what I believed
20 he provided.
21 Q. Okay. I'm going to ask you again.
22 Because I don't think that that responds to my
23 particular question.
24 I'm wanting to know whether you have
25 any personal knowledge of information which you

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1 believe Benjamin Arave provided to you or to the
2 other co-investors and which was relied upon in
3 purchasing the 1675 property?
4 A. I don't recall what information he
5 provided --
6 Q. Okay.
7 A. -- to Paul Fife that we relied on --
8 Q. Okay.
9 A. -- to make the purchase.
10 Q. Okay. Is it fair to say that when you
11 relied on particular things that were said that
12 you were relying on what was being told to you by
13 either Jeff Needs or Tom O'Shea?
14 A. Yes.
15 Q. Okay. You didn't rely on direct
16 statements that you heard directly from either
17 Benjamin Arave, Gordon Arave or Jared Arave.
18 A. No.
19 Q. Okay. Or from Paul Fife, for that
20 matter.
21 A. Correct.
22 Q. Okay. And just so that we're clear,
23 everything you relied upon in deciding on whether
24 to purchase the 1675 Curlew property came from
25 either Jeff Needs or Tom O'Shea.

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1 A. Yes.
2 Q. Did you do any independent evaluation
3 to determine whether what you were being told or
4 what you weren't being told by Jeff Needs and Tom
5 O'Shea was true and accurate?
6 A. We had -- I had conversations with Tom
7 and believed that we could rely on the
8 information that had been provided to us to
9 proceed with the purchase.
10 Q. Why did you have that particular
11 belief?
12 A. We -- well, I think for starters, I
13 imagined that the LoopNet Listing was reliable;
14 that the Sellers would be honest; that the tenant
15 was not in default; and that, had he been, it
16 would have been disclosed.
17 Q. Did you assume or did you trust Tom to
18 do the investigation into the property to
19 determine whether it would be a worthwhile
20 investment?
21 A. Yes.
22 Q. Is that because he's a family member?
23 A. That would be one of the reasons.
24 Q. Any other reasons?
25 A. I trust him, not because he's a family

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1 member, I trust him because I trust him.
2 Q. Okay. Do you trust him because he's a
3 former Catholic Priest?
4 A. I trust him because I trust him. I
5 know him.
6 Q. Okay.
7 A. I love him. He's my brother-in-law and
8 I have trust in him and I've done business with
9 him.
10 Q. Okay. Were you -- prior to closing,
11 did you ever seek to find out whether the tenant
12 had ever been met by either Tom or Jeff?
13 A. Could you ask the question again?
14 Q. Sure.
15 Did you ever wonder, prior to closing,
16 whether Tom and/or Jeff had met with the tenant
17 to discuss its business model; or just to meet
18 the tenant, make sure he existed?
19 A. I know that Tom went to the property.
20 I know that he was asked to not meet
21 the tenant.
22 I know that he went anyway to the
23 property and that he went in and looked around
24 and saw the parking area.
25 Q. Okay. When you say that you know that

Transcript of the Testimony of **Kate Donahue**

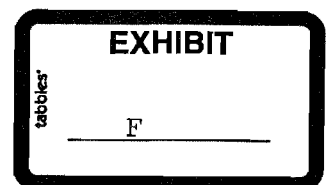
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Printed On: December 15, 2009

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1 A. What did I do? Could you ask -- just
2 elaborate on that, please.

3 Q. Do you remember anything in particular
4 about that initial communication, whether it was
5 the first, the second or one of the initial
6 communications to you or to the San Francisco
7 Residence Club about this property in Idaho
8 Falls?

9 A. The first -- one of the initial
10 communications was the LoopNet advertisement that
11 we received -- that I received from -- over the
12 internet.

13 Q. Was that the first thing that you
14 looked at?

15 A. Yes.

16 Q. So, did you actually view the LoopNet
17 ad prior to closing?

18 A. Yes, I did.

19 Q. And did you look at that with anybody
20 present with you?

21 A. No.

22 Q. You looked at that yourself?

23 A. Yes.

24 Q. Did you look at it with Kevin?

25 A. No.

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1 Q. And did you rely on that document in
2 making the ultimate decision as to whether the
3 San Francisco Residence Club ought to invest
4 money in purchasing this property?

5 A. Did I rely on that in order to purchase
6 it?

7 Q. Yes.

8 A. I relied on that to become interested
9 in it.

10 Q. Okay. So, maybe to wet your appetite,
11 if you will; or peak your interest in the
12 property.

13 A. Yes.

14 Q. Has that been your experience, when you
15 look to invest in properties, you look at the
16 initial ad and then you do your own investigation
17 of whether it would be a worthwhile investment?

18 A. Yes.

19 Q. Okay. Do you remember when it was that
20 you would have looked at the LoopNet ad?

21 A. Late summer. It might be August.

22 Q. Okay. Let me ask you this: As far as,
23 you individually as Kate; and the entity, San
24 Francisco Residence Club, was it always a plan,
25 in your mind, to be an investor, personally, as

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1 well as have the San Francisco Residence Club be
2 an investor?

3 And let's limit it to the property here
4 in Idaho Falls.

5 A. In answer to my participation, I had a
6 1031 so I was looking at property.

7 And the plans for the San Francisco
8 Residence Club, they didn't -- San Francisco
9 Residence Club was not obligated to participate
10 in a 1031.

11 So, whether they did or not, we didn't
12 have any particular plans for reinvesting.

13 Q. Okay. When did that come about?

14 A. When the deal started to get put
15 together.

16 Q. Do you remember anything in particular
17 that triggered the decision to be an investor for
18 the San Francisco Residence Club?

19 A. Not anything in particular.

20 Q. How about anything in general?

21 A. No.

22 Q. Okay.

23 (Exhibit No. 2 marked.)

24 BY MR. ARMSTRONG:

25 Q. Handing you what's been marked as

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1 Exhibit 2 to your deposition, have you ever seen
2 this document before?

3 A. Yes.

4 Q. And if you look on the second page, is
5 that your signature?

6 A. Yes.

7 Q. And you're signing this document in
8 your capacity as a secretary of the corporation?

9 A. Yes.

10 Q. Okay. And can you identify what this
11 record is or what this document is?

12 A. It's Minutes of Special Meeting of the
13 Board of Directors of the San Francisco Residence
14 Club, Incorporated.

15 Q. Okay. And the date of that meeting?

16 A. November 12, 2007.

17 Q. And do you recall there actually being
18 a meeting where you met as a Board of Directors
19 on November 12, 2007 as reflected in these
20 minutes?

21 A. No.

22 Q. Are you aware of testimony that Anne
23 O'Shea gave with regard to this document?

24 A. Yes.

25 Q. Do you recall what she said?

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1 Did the San Francisco Residence Club
2 sign that document, to your knowledge?
3 A. No.
4 Q. Okay. So, it had the Real Estate
5 Purchase Contract.
6 And you're speaking as a group, right?
7 A. Yes, I'm speaking as the San Francisco
8 Residence Club, Incorporated.
9 Q. I see.
10 A. The group of us, yes.
11 Q. Okay. And it had the Lease Agreement.
12 And that would be the Lease Agreement of the
13 Children Center?
14 A. Yes.
15 Q. Okay. What else?
16 A. We had also received a pro forma from
17 Jeff.
18 There was an Estoppel.
19 Those are the main documents I remember
20 receiving.
21 Q. Okay. And those are the main documents
22 that you would characterize as being the
23 documents that would have been reviewed as a
24 group or as the entity, San Francisco Residence
25 Club, in doing its due diligence?

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1 A. Those are the documents I remember
2 receiving via e-mail. The e-mail was sent to me.
3 Q. Okay. But going back to my question --
4 Do you want me to read it back to you?
5 A. Yes, I do, please.
6 MR. ARMSTRONG: If you could, please,
7 read that back, Madam Court Reporter.
8 (The record was read.)
9 A. Those were documents we received as
10 part of the due diligence, yes.
11 BY MR. ARMSTRONG:
12 Q. Did you receive any other documents
13 that you reviewed as part of the due diligence of
14 the San Francisco Residence Club?
15 A. We did, but I'm not sure which ones
16 those are.
17 Q. Okay. So, it's your testimony the
18 group could have reviewed other documents prior
19 to closing other than the ones you've listed
20 here, but you just don't know, as you sit here.
21 A. You can ask me which ones they are and
22 then I will know.
23 I don't know, off the top of my head,
24 all of them that we received.
25 Q. When you -- let's just go through the

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1 list that you provided up to this point and then
2 we'll go from here.
3 You testified, as a group, you received
4 a LoopNet ad from Jeff Needs.
5 A. Yes.
6 Q. You received the Real Estate Purchase
7 Contract.
8 A. Yes.
9 Q. You received the Lease Agreement that
10 had been entered into with the Children's Center?
11 A. Yes.
12 Q. You received a pro forma from Jeff
13 Needs.
14 A. Yes.
15 Q. And you had received an Estoppel
16 Certificate?
17 A. Yes.
18 Q. Okay. And those are documents that you
19 know, specifically, that the San Francisco
20 Residence Club received and reviewed prior to
21 closing.
22 A. Those were sent to me, to Kate Donahue
23 in an e-mail.
24 Q. Okay.
25 A. I did not receive anything that was

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1 addressed to the San Francisco Residence Club.
2 Q. Okay.
3 A. Those were received, personally, by me.
4 Q. Were you receiving those, personally,
5 because of your personal interest in the property
6 or because of the dual purpose of the San
7 Francisco Residence Club also being a potential
8 investor?
9 A. I was receiving those as a personal
10 investor.
11 Q. Okay.
12 A. I did not know what the involvement of
13 the Residence Club would be at that time.
14 Q. So, would you have received these five
15 documents that we've listed prior to your going
16 to France?
17 A. Some of them would have come prior to
18 going to France.
19 Q. Okay. We looked at Exhibit 2, which
20 was the minutes of the special meeting on
21 November 12.
22 You were in France at that time?
23 A. Yes.
24 Q. Is that the date that the San Francisco
25 Residence Club had actually decided, to your

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1 A. My recollection at this time is that
2 these were the things I had seen.
3 Q. Okay. Do you have any personal
4 knowledge as to who drafted the tenant Estoppel
5 Certificate? Any of the versions.
6 A. No.
7 Q. Okay. Has Mike Shiffman ever acted as
8 your attorney?
9 A. In what capacity?
10 Q. In your personal capacity as Kate
11 Donahue.
12 A. Yes.
13 Q. Okay. Was his representation of you --
14 did he represent you or the San Francisco
15 Residence Club with regard to this transaction,
16 the 1675 Curlew transaction?
17 A. What do you mean by "represent?"
18 Q. Did you understand him to represent
19 your interest as they related to the 1675
20 property prior to closing?
21 A. What -- if you could just clarify what
22 you mean by "represent."
23 Q. Well, you're being represented by
24 counsel in this case, your interest in court
25 asserting claims on your behalf.

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1 Did you understand Mike Shiffman to
2 represent any of your interests as they related
3 to 1675 Curlew prior to closing?
4 A. Mike Shiffman was asked for guidance
5 with some of the documents.
6 Q. Okay. Were you a party to those
7 discussions?
8 A. I am not sure what part I was. I know
9 we had discussions with Mike. I don't know if I
10 was a party to them or if I heard about them
11 after they had been discussed.
12 Q. Would that have been prior to closing?
13 A. Yes.
14 Q. Okay. So, it is your understanding
15 that he was representing the group's interest as
16 it related to -- or as they related to the 1675
17 Curlew property.
18 A. Mike did not represent us. We asked
19 him for guidance about some of the documents; the
20 Estoppel, I know he helped on the TIC. I
21 wouldn't say that he represented us.
22 Q. Okay. But as far as having an
23 attorney/client relationship with you, are you
24 aware of that relationship ever being formed,
25 formally, where he -- where you hired Mr.

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1 Shiffman to be your attorney as it related to
2 1675 Curlew prior to closing?
3 A. Well, as far as hiring him, if we asked
4 him a question, we were given advice and we would
5 receive a bill for that advice.
6 Q. Did you ever pay any of Mike Shiffman's
7 bills as it related to the 1675 Curlew property
8 prior to closing?
9 A. I don't know if we paid them or they
10 were part of the escrow.
11 Q. I'm talking about you, individually.
12 Do you know?
13 A. No.
14 Q. As you look back on this transaction --
15 hindsight is always in 20/20. As you look back
16 on the transaction, is there anything that you
17 feel either Jeff Needs or Tom O'Shea should have
18 been done differently?
19 A. No.
20 Q. You felt like they performed due
21 diligence on behalf of the group the way that
22 they should have?
23 A. That they performed due diligence?
24 They received different documents and
25 then that's what we relied on.

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1 Q. Okay. As far -- the record has
2 indicated that there was one visit made by Mr.
3 O'Shea and Mr. Needs to the Children's Center to
4 do a site inspection.
5 Are you aware of that?
6 A. Yes.
7 Q. And were you aware of when that
8 occurred?
9 A. It was before the closing. I don't
10 know what month it was.
11 Q. Okay. Did you find out about it after
12 the fact, after the site inspection?
13 A. No. I don't know -- I don't recall
14 what month they went.
15 Before they were going, we discussed
16 their trip coming up here while they were here.
17 And then when they returned, we heard
18 about the trip.
19 Q. Okay. How did you hear about the trip?
20 A. Probably on the telephone or it may
21 have been -- shortly after he returned, we would
22 have gotten together.
23 Q. You weren't in France at the time?
24 A. I don't know what month it occurred.
25 Q. Was it prior to going to France?

Transcript of the Testimony of **Jack Anthony Chillemi**

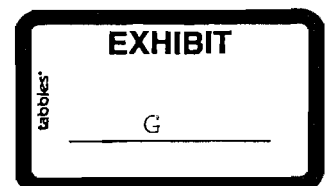
Date: September 29, 2009

Volume: I

Case: O'SHEA v. HIGH MARK DEVELOPMENT

Printed On: December 15, 2009

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1 what the tenant was doing for the community. I
2 recall thinking: That is great. That would be
3 great to have an investment project where we're
4 involved at some level with something like that.

5 He described the ten year lease
6 characteristic of it. He relayed to me what Jeff
7 Needs had relayed to him in terms of how safe he
8 felt -- perhaps safe is the wrong word. But how
9 strong of an opportunity he felt this was.

10 He made it very clear to me that this
11 was not going to be one of these opportunities where
12 we could expect some windfall down the road. It was
13 one of these: Here's what it is, steady tenant,
14 basically income in the mail every month type of
15 thing.

16 Q Okay. This was what he told you in the
17 car while you were driving to the golf course?

18 A Yes. He would have also said this to
19 me while we were at his house as well just in terms
20 of furthering, further discussing it.

21 Q Okay. While you were in the car going
22 to the golf course, did you have any documents --
23 strike that. Did Mr. O'Shea have any documents for
24 you to look at?

25 A No.

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1 Q Okay. How long was your discussion in
2 the car on the way to the golf course about the
3 investment opportunity here in Idaho Falls?

4 A Approximately 20 minutes.

5 Q Anybody else in the car with you?

6 A No.

7 Q When was the next time that you had any
8 sort of discussion with Mr. O'Shea -- strike that.

9 Prior to, or at the time that you had this
10 discussion with Mr. O'Shea in the car in the summer
11 of 2007 driving to the golf course, did you know
12 Jeff Needs?

13 A No.

14 Q Had you ever met him before?

15 A No.

16 Q After this discussion in the car going
17 to the golf course, when was the next time that you
18 had any sort of a discussion with Mr. O'Shea about
19 investing here in Idaho Falls?

20 A I don't recall specifically. It could
21 have been later that day when we returned to the
22 O'Shea residence. It could have been the next day
23 just as well.

24 Q Tell me about that next time.

25 A The next time I believe we had a

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1 conference call with Jeff Needs. I would have been
2 in Tom's office at his home. It was at that point
3 that I met Jeff Needs for the first time over the
4 phone.

5 Jeff would have reinforced at that
6 point in the conversation the things that Tom told
7 me the day before or two days before.

8 Q Give me your fullest recollection of
9 what was said in that meeting, that second next
10 discussion.

11 A With Jeff Needs?

12 Q With Jeff needs.

13 A Again, it would have been Jeff
14 basically echoing a lot of Tom's comments regarding
15 the characteristics of the opportunity in Idaho
16 Falls.

17 Q Okay.

18 A I don't recall -- I don't recall
19 specifics at this point.

20 Q How about anything else generally that
21 you recall?

22 A We looked on Tom's computer with Jeff
23 on the phone at the LoopNet advertisement.

24 Q And did you have a discussion with
25 either of those gentlemen in that conversation about

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1 that LoopNet ad?

2 A Nothing specific comes to mind other
3 than actually seeing it and reading it.

4 Q You read it?

5 A I did.

6 Q Did you ask any questions about it?

7 A I don't recall.

8 Q Did Tom O'Shea say anything about that
9 ad while you were looking at it?

10 A I don't recall.

11 Q Did Jeff Needs?

12 A I don't recall.

13 Q Any other documents that you looked at
14 with Mr. O'Shea and Mr. Needs in that second
15 discussion?

16 A No, not at that point. I don't believe
17 we had any documents at that point beyond the
18 LoopNet advertisement.

19 Q Was there an end result from that
20 meeting?

21 A There was interest on my part.

22 Q Describe that for me.

23 A I wanted to know more about it.

24 Q Okay. Had you decided at that point to
25 invest?

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1 time seeing these probably the first couple of pages
2 of both the 2005 tax return and the 2006 tax return.

3 Since then, I have reviewed or looked
4 over all the pages in this exhibit.

5 Q Okay.

6 A That would have been sometime -- that
7 would have been after the close.

8 Q Okay. So the first time you ever
9 looked at a full set of the tax returns from 2005
10 and 2006 for The Children's Center would have been
11 post closing?

12 A Correct.

13 Q Okay. And prior to closing you recall
14 reviewing one or two pages of each year?

15 A Correct.

16 Q Okay. When it was explained to you why
17 there was this imbalance of expenses with income in
18 the tax returns, did you want to know more
19 information about The Children's Center financial
20 position?

21 A At the time I accepted the explanation
22 that was given to me regarding, regarding why the
23 expenses were higher in 2006 than they were in 2005
24 which resulted in a loss for The Children's Center.

25 Q Okay. Again, give me your fullest

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1 recollection of how that was explained to you.

2 A I believe it was explained to me via a
3 conference call with Jeff Needs and Tom O'Shea with
4 Jeff explaining that The Children's Center was going
5 through a growth period which was one of the reasons
6 why they wanted to move to this building a year and
7 a half ago because they anticipated a need for more
8 space.

9 They were hiring additional
10 physicians -- I do recall specifically physicians --
11 which explained the additional costs.

12 That is what I recall.

13 Q Anything else that you recall being
14 said in explanation of this issue of more expenses?

15 A No.

16 Q So, did you understand at this time
17 that you reviewed a few pages of the tax returns
18 that The Children's Center was moving into a new
19 facility, or had moved -- that this facility was
20 relatively new to them?

21 A I did.

22 Q Okay. Was it at that time then that
23 you had decided to purchase or to invest in the 1675
24 property?

25 A I would say it was approximately at

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1 that time that I decided to invest.

2 Q Was there any other information that
3 you looked at or relied on in making that decision
4 other than what you testified to?

5 A I believe I saw an internal profit and
6 loss statement for 2007 through mid-year June.

7 Q Anything else?

8 A I don't recall anything else.

9 Q Okay. I am handing you what was marked
10 as Exhibit 2 to the Caleb Foote deposition.

11 A Excuse me. Let me restate that. I do
12 still -- I do recall -- there was something else.
13 There was a document that I believe Gordon Arave had
14 sent to Jeff Needs showing a summary of rents
15 received from June 2006 through, I believe, July of
16 2007.

17 Below that it had listed Cam charges
18 that had been collected to-date, and then there were
19 some expenses. In addition to that, there was also
20 a page that Arave -- it was a letter, a very brief
21 letter, stating that he would agree to, I believe,
22 indemnify the buyers for up to one percent of any
23 loan assumption fees. And that was faxed over to us
24 from Jeff Needs.

25 Q Okay.

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1 Let's make sure I am clear on that list
2 because I think we have a couple of documents that
3 you can look at.

4 But you indicated -- again, this is in
5 response to a question that I asked you about the
6 documents that you reviewed and or relied upon in
7 deciding whether to invest in this property.

8 Your testimony was a few pages from the
9 tax returns from The Children's Center for 2005 and
10 2006, is that correct?

11 A That's correct.

12 Q Also a partial profit and loss
13 statement for the first half of 2007?

14 A Correct.

15 Q Okay. Any other documents that you
16 recall?

17 A I don't -- I don't know what this other
18 document would be called. It was a summary of rents
19 received.

20 Q Let me hand you what was marked as
21 Exhibit 4 to Caleb Foote's deposition. Do you
22 recognize that as being that summary of rents
23 received?

24 A I do.

25 Q And I think your testimony was that

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1 this was a sheet that Gordon Arave had faxed to Jeff
 2 Needs?
 3 A Yes. I have seen another version. I
 4 believe it's the same document. It does have a
 5 different heading, a fax stamp so to speak, on it.,
 6 in fact, I think I can even tell you the date. The
 7 date of that fax would have been September 18, 2007.
 8 It was part of a four-page fax.
 9 I believe that either Arave faxed it to
 10 Fife and then Fife got it to Jeff Needs, or Arave
 11 faxed it directly to Needs and then Needs faxed it
 12 to Tom O'Shea.
 13 Q And that document that you're referring
 14 to: Do you know what that is, or what information
 15 was contained in that document that you just
 16 described?
 17 A You are you talking about the letter,
 18 the other -- I believe it had an assumption fee
 19 offer, the offer to pick up the assumption fee, if
 20 there was one, of up to one percent if the lender
 21 was going to charge that.
 22 Q And that is this three or four page
 23 document that you received by fax in September of
 24 2007?
 25 A That Tom O'Shea received.

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1 Q That Tom O'Shea received?
 2 A Yes. He showed that to me in his
 3 office on one of those days that I would have been
 4 there.
 5 Q Okay. Let me understand exactly what
 6 it was that you, or that Mr. O'Shea had received and
 7 that you had looked at at that time. What do you
 8 recall seeing?
 9 A I saw a cover page from Jeff Needs. In
 10 the body or the comment section it said that the
 11 seller is offering to reimburse the buyer for up to
 12 one percent of any loan assumption fee that Stan
 13 Corp., the lender, may charge. In addition to that
 14 there was this document as well.
 15 Q Okay. And by this document, you're
 16 referring to Exhibit 4 of Caleb Foote's deposition?
 17 A Right. The specific document I saw was
 18 slightly different than this one because this one
 19 looks like it's coming from -- the top portion of
 20 this document is slightly different because it does
 21 not contain the additional fax stamp on it.
 22 Q Okay. I'm handing you Exhibit 3. Do
 23 you recognize that as being a document that you
 24 would have received?
 25 A I've never seen this document prior to

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1 today.
 2 Q Okay.
 3 A Let me -- I would like to clarify -- I
 4 don't recall ever seeing this document prior to
 5 today.
 6 Q Okay.
 7 A I am fairly certain of it.
 8 Q Now, as far as these documents coming
 9 from Gordon Arave that you testified about earlier,
 10 the letter with the assumption of -- strike that.
 11 Did you understand that that
 12 information came from Gordon Arave based on what
 13 Mr. O'Shea told you, or was that a conclusion you
 14 reached based on looking at the documents?
 15 A That is a conclusion that I reached
 16 based on what the fax cover sheet indicated which
 17 Jeff Needs wrote out. It specifically said this is
 18 what the seller -- and I understood Gordon Arave to
 19 be the seller.
 20 Q Okay.
 21 A I concluded that it came from him or
 22 someone from his office.
 23 Q Okay. Had you ever looked at the real
 24 estate purchase contract prior to reviewing these
 25 documents that you testified to?

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1 A No.
 2 Q Do you think that would have been a
 3 fair source of identifying who the seller is?
 4 A I think it could have been a fair --
 5 Q Okay. Were you aware, prior to the
 6 closing, of personal obligations that Gordon Arave
 7 had offered to take on with regard to the sale of
 8 this particular property?
 9 A Personal obligations: Could you
 10 clarify that?
 11 Q Well, were you aware of an agreement in
 12 one of the addenda to the real estate purchase
 13 contract that dealt with Mr. Arave personally
 14 indemnifying the buyers in the event the option was
 15 ever exercised by the tenant?
 16 A I never saw anything in writing about
 17 that. But Tom O'Shea did mention that in one of our
 18 discussions. I believe that would have been a group
 19 discussion.
 20 I do know that the removal of the
 21 purchase option was something that he and
 22 Mr. Shiffman were working on diligently. I got the
 23 impression at the time that that was something that
 24 was not acceptable to us to have that purchase
 25 option contained in the document -- in the lease

Transcript of the Testimony of **Caleb Foote**

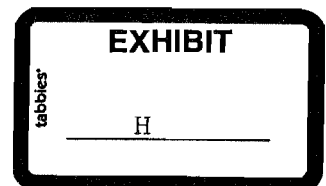
Date: September 29, 2009

Volume: I

Case: O'SHEA v. HIGH MARK DEVELOPMENT

Printed On: December 15, 2009

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1 was probably in the early summer, maybe late summer
2 of 2007.
3 Q Okay. Who was present at that dinner?
4 A I believe it was only the O'Shea's and
5 myself.
6 Q I don't know if I asked you this: But,
7 are you married?
8 A Yes.
9 Q Do you have children?
10 A I do have two children.
11 Q What are their ages?
12 A I have a daughter who is 39 years old.
13 And I have a son who is 37 years old.
14 Q Okay. And you are still married?
15 A I am on my second marriage. These
16 children are from my first marriage.
17 Q Okay. And how long have you been
18 married to your second wife?
19 A We have been together for 20 years. We
20 have been legally married for seven years.
21 Q Okay. Going back to this dinner in the
22 summer of 2007 where you and the O'Shea's were
23 present, was your wife present with you?
24 A I do not recall -- I do not recall
25 whether she was present.

Page 11

1 Q And were you having dinner with the
2 O'Shea's specifically for purposes of talking about
3 this investment opportunity?
4 A No.
5 Q Was it just a friendly get-together?
6 A It was just a friendly neighborhood get
7 together.
8 Q Give me your fullest recollection of
9 what was said at that time about this investment
10 opportunity.
11 A I believe Tom thought this was a very
12 solid investment. He mentioned that it was a 2000
13 square foot medical building in Idaho Falls that had
14 a ten-year lease and a triple net lease. That it
15 had a great income, with good positive cash flow;
16 and that we could expect a seven to eight percent
17 return on the investment.
18 Q He told you this in this meeting in the
19 summer of 2007?
20 A That's correct.
21 Q Did Anne say anything about the
22 investment?
23 A I don't believe that she talked about
24 it at all. I am not sure whether anne had seen the
25 building by that time or not. I think this was

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1 probably in the preliminary stages when Tom was
2 meeting with Jeff Needs. I am not sure whether that
3 was before or after Tom had come to Idaho to explore
4 the building.
5 Q Did he show you any documents in that
6 meeting or in that dinner party?
7 A No.
8 Q So, he did not have a proforma?
9 A Not at that time.
10 Q Okay. What was the end result of the
11 meeting with the O'Shea's that evening?
12 A The end recall was that Tom said if I
13 was interested in putting some money into the
14 deal -- they were looking for a small investor such
15 as myself. And that if I wanted to put in a hundred
16 dollars or fifty thousand or a hundred thousand,
17 that would be fine.
18 And if I was interested we could talk
19 about it in the future.
20 Q And did you make any kind of a decision
21 at the dinner party?
22 A No, I did not.
23 Q When was it that you decided then to
24 invest some money into this property? When I say
25 "this property", I am talking about the 1675

Page 13

1 property here in Bonneville County?
2 A I believe it was probably within the
3 following two weeks of the meeting or the dinner
4 party with Tom and Anne. After discussing with my
5 wife, and it looked like a great business
6 opportunity -- I did not have any commercial
7 property in my investment portfolio -- I thought it
8 would be a way to diversify.
9 The way that Tom described the
10 investment, it looked like a very low-risk
11 proposition. And with a ten-year triple net lease,
12 with an eight percent cap, it sounded wonderful.
13 Q Okay. What was your wife -- what is
14 your wife's name?
15 A Lorie Anne Goodfellow.
16 Q What happened between the time that you
17 met at the dinner with the O'Shea's where they
18 presented this investment opportunity to you and had
19 invited you to invest whatever amount you felt
20 comfortable investing and then the decision you made
21 two weeks after that?
22 What happened in that two-week time
23 period? Did you see documents? Did you talk with
24 an investment counselor?
25 A Yes, I did talk with Tom. I think he

Page 14

1 showed me the LoopNet advertisement. I think he
2 showed me the financial information that we were
3 given by Paul Fife regarding the property with the
4 income statements that all the rents were being paid
5 on a current basis and there were no defaults.

6 That The Children's Center was up to
7 date on all of their payments to Arave. I think I
8 reviewed those with Tom. I looked at that. I
9 also -- I think I looked at a projection sheet that
10 Jeff Needs had produced based on the information
11 that we had received from Paul Fife and the Arave's;
12 that within the first year of purchase that we could
13 expect a profit of approximately 112,000 as I
14 remember which worked out to be a seven to eight
15 percent return on our investment after everything
16 was paid.

17 After further discussion with Tom I
18 told him that I would be interested in investing
19 \$100,000 into the group that was going to make the
20 investment. And that it sounded like a very
21 promising investment.

22 Q Let's go back to my question about what
23 happened in the two week time period between the
24 time that you met at dinner and the time that you
25 made the decision to invest in this property.

Page 15

1 You indicated that you reviewed some
2 documents?

3 A Yes.

4 Q You mentioned a LoopNet ad?

5 A Yes.

6 Q Who showed that to you?

7 A Tom.

8 Q And what did he tell you when he showed
9 you that document?

10 A He said that he had received this from
11 I believe Jeff Needs and Needs Real Estate; that all
12 the information looked accurate. He said that this
13 is just an amazing opportunity, brand new building.

14 Q Tom said that the information on the
15 LoopNet ad looked accurate?

16 A Yes. He told me that he had reviewed I
17 guess financial information and I guess discussed
18 this with Jeff Needs. I don't know whether he had
19 talked with any other individuals at that time.

20 But basically we took the LoopNet thing
21 and the financial information that we had at that
22 time; that all rents had been paid I think. I think
23 that is what the decision was on my part.

24 And I was just taking it at face value
25 that all the information that I had was true and

Page 16

1 correct.

2 Q Okay. Let's go back to some of these
3 documents that you reviewed or some of the
4 information; some of these things that transpired in
5 the two week period between the dinner party and
6 your decision to invest.

7 You indicated that you looked at the
8 LoopNet ad with Tom.

9 A Yes.

10 Q He told you that it looked accurate.
11 The information, that it looked accurate?

12 A Right.

13 Q You took that at face value?

14 A I did.

15 Q Where were you when he showed you this
16 LoopNet ad?

17 A I believe I was at the O'Shea's house

18 --

19 Q Okay.

20 A -- probably sitting there in their
21 kitchen nook.

22 Q Had he called you over to take a look
23 at some information specifically?

24 A I am not sure whether he called me or I
25 called him. But we got together on a mutual basis

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1 to you know discuss the information that he had at
2 hand.

3 Q Okay. So you went over to his house
4 and he had a LoopNet ad there for you to look at?

5 A That's correct.

6 Q Had he printed it off the computer?
7 Was it on a computer screen that you looked at?

8 A I think it had been printed off.

9 Q Okay. And did you retain a copy of
10 that?

11 A I did.

12 Q Okay. So did you -- let's finish the
13 list of the information that you reviewed there with
14 Mr. O'Shea the second time that you talked to him
15 about it.

16 A Yes.

17 Q Is it fair to say this was the second
18 time that you had met with Mr. O'Shea on investing
19 in the 1675 property?

20 A I believe that is true, yes.

21 Q Okay. What other documents did he
22 have?

23 A At that time?

24 Q That you remember reviewing and looking
25 at.

Page 22

1 sounded like a very, very good investment
 2 opportunity.
 3 Q Okay. You were 75 percent convinced it
 4 was a good investment opportunity.
 5 My question is a little bit more
 6 specific. Had you decided in the second meeting
 7 with Mr. O'Shea that you were going to invest
 8 whatever amount of money it was that you were going
 9 to invest?
 10 A I had pretty much decided that I would
 11 invest -- I am not sure whether I decided the exact
 12 amount, but I think I told him that I was interested
 13 in investing fifty to \$100,000.
 14 Q You told him in that meeting you were
 15 in?
 16 A Yes, basically.
 17 Q Okay. Do you recall this dinner party
 18 that you testified to occurred in the summer of
 19 2007. The closing in this case, on this particular
 20 building, occurred on December 11, 2007.
 21 Does that date ring a bell with you?
 22 A Yes.
 23 MR. CROCKETT: Actually --
 24 MR. ARMSTRONG: I may be off by one or
 25 two days.

Page 23

1 MR. CROCKETT: I think it's actually
 2 December 12th.
 3 MR. ARMSTRONG: Okay.
 4 BY MR. ARMSTRONG:
 5 Q With that correction, does that comport
 6 with your memory?
 7 A Yes.
 8 Q Okay. Between the dinner party and the
 9 closing you testified to discussions that you had
 10 with Tom O'Shea --
 11 A That's correct.
 12 Q -- about the investment. You decided
 13 to invest after that second meeting. After that
 14 second meeting -- between that second meeting and
 15 closing, do you recall any other meetings that you
 16 had or discussions that you had with any of the
 17 investors about investing in this property?
 18 A I believe I had several other
 19 discussions with Tom O'Shea. It was mainly around
 20 giving me -- I think there were two two-page
 21 summaries of income tax returns from The Children's
 22 Center. I think there were two pages -- a two-page
 23 summary of 2005 and a two-page summary of 2006 tax
 24 returns that looked like The Children's Center had
 25 been making, as I recall, 4.2 to 5.7 million dollars

Page 24

1 in income.
 2 That they had paid their taxes on time.
 3 There were no questions regarding that. I think I
 4 saw the lease estoppel certificate. There were
 5 several initially. One I think that Tom gave me
 6 that had where the tenant had a clause that said
 7 that they had the right to purchase the building
 8 within three years of the deal I thing.
 9 Then a later estoppel certificate that
 10 was removed. I think the other one was a profit and
 11 loss statement that I believe showed that they had
 12 been making a lot of income, paying their rents on
 13 time as I recall.
 14 I never received a balance sheet. I am
 15 not -- I don't think Tom had received a balance
 16 sheet either on the investment. And I think that is
 17 about it.
 18 MR. ARMSTRONG: Okay.
 19 (Exhibit 1 marked)
 20 BY MR. ARMSTRONG:
 21 Q I am handing you an exhibit that has
 22 been marked as Exhibit Number 1 to your deposition.
 23 Have you ever seen that document before?
 24 A I have seen the first two or three
 25 pages of this. I don't think I saw the entire tax

Page 25

1 return.
 2 Q Okay. Now your testimony earlier was
 3 that you remember at some point in time after that
 4 second meeting, after you had decided to invest, you
 5 had seen a two-page --
 6 A I think it was the initial two pages of
 7 this tax return that I saw. I don't remember if it
 8 was two or three pages.
 9 Q I will represent to you that the stack
 10 of documents there that I handed you actually
 11 include the 2005 tax return for The Children's
 12 Center, the 2006 tax return for The Children's
 13 Center. The last two pages are a balance sheet of
 14 The Children's Center.
 15 I know there is a dispute in this case
 16 as to whether the balance sheet was ever received by
 17 Mr. Needs and then passed along to the plaintiffs in
 18 this case.
 19 A The only thing that I saw -- and I
 20 think that Tom gave me -- was a two-page summary of
 21 the first two pages of 2005 and the first two pages
 22 of 2006.
 23 I never received the rest of the tax
 24 returns, and I never received a balance sheet.
 25 Q Okay. Let's stick to what you did

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1 (Exhibit 4 marked)
 2 BY MR. ARMSTRONG:
 3 Q Handing you what was marked as Exhibit
 4 4 to your deposition. Do you recognize that
 5 document?
 6 A Yes, I do. I have seen this before.
 7 Q What is that?
 8 A The Idaho Falls Children's Center rent
 9 received.
 10 Q Okay. Do you remember what the
 11 circumstances were of your receiving this document?
 12 A I don't recall. I remember receiving
 13 this. And I think it was sometime during the fall
 14 of 2007. Looked like all rents had been paid and
 15 that the building maintenance, expenses and
 16 everything else had been paid.
 17 Q Do you remember receiving Exhibit 4
 18 around the same time that you received Exhibit 3?
 19 A I think it was sometime in the fall of
 20 2007. I don't recall the exact time.
 21 Q Okay. Do you recall if it was at or
 22 near the time that you had received Exhibit 3 that
 23 you had received Exhibit 4?
 24 A I don't.
 25 Q Did you ever do any independent

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1 analysis on your own about whether this would be an
 2 investment that you would want to make?
 3 A No.
 4 Q Is there a reason why?
 5 A No.
 6 Q Is it because you just assumed that the
 7 investigation --
 8 MR. CROCKETT: Objection. He has
 9 answered the question, Counsel.
 10 THE WITNESS: I already assumed that
 11 the investigation had been done to my
 12 satisfaction by people who I respected and had
 13 much more experience in evaluating these sorts of
 14 transactions.
 15 BY MR. ARMSTRONG:
 16 Q Those people would have been Tom O'Shea
 17 and or Jeff Needs?
 18 A Yes.
 19 Q Anybody else?
 20 A No.
 21 Q Okay. Do you recall reviewing --
 22 we've looked at Exhibits 1, 2, 3 and 4 of your
 23 deposition. And these documents appear to be
 24 financial information related to The Children's
 25 Center.

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1 Would you agree with that?
 2 A I would agree with that.
 3 Q Okay. Was there any other financial
 4 information that you had related to the tenant prior
 5 to closing?
 6 A I don't believe so.
 7 Q Okay. So what we looked at in Exhibits
 8 1 through 4 would be the totality of financial
 9 documents that you would have had or received?
 10 A I think -- this is what I recall
 11 remembering. I don't know whether you would
 12 consider the lease estoppel certificate another
 13 financial document, but I also saw that.
 14 Q Okay.
 15 MR. CROCKETT: Just to correct the
 16 record, Counsel, he said he did not see the
 17 balance sheet which is included in the exhibit.
 18 He saw two or three pages of each tax return.
 19 BY MR. ARMSTRONG:
 20 Q And that was your testimony, was it
 21 not?
 22 A That's correct.
 23 Q As far as Exhibit 1 is concerned --
 24 A As far as Exhibit 1 is concerned, I
 25 don't think I saw the entire document. I saw two or

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1 three pages of the 2005 and two or three pages of
 2 the 2006 tax returns.
 3 Q Let's go to the last two pages of the
 4 tax returns in Exhibit 1.
 5 A I never saw this.
 6 Q Okay. Did you ever see a copy of the
 7 real estate purchase contract in this case prior to
 8 closing?
 9 A I don't recall.
 10 (Exhibit 5 marked)
 11 BY MR. ARMSTRONG:
 12 Q Handing you Exhibit 5 to your
 13 deposition. That is a copy of the complaint that
 14 was filed in this case. Prior to that complaint
 15 being filed, did you review it?
 16 A Did I review this prior to it being
 17 filed?
 18 Q That's correct.
 19 A I don't believe I did.
 20 Q Okay. There are a number of exhibits
 21 that are attached to this complaint. I would like
 22 you to go to the exhibit that has been marked as
 23 Exhibit C --
 24 A (witness complies).
 25 Q -- to the complaint. Now go back a few

Transcript of the Testimony of **Thomas O'Shea**

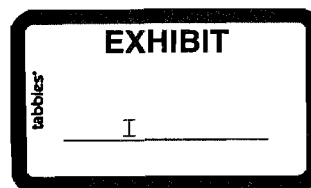
Date: May 12, 2009

Volume: I

Case: O'SHEA, ET AL v. HIGH MARK DEVELOPMENT

Printed On: December 15, 2009

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DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 18 PAGE 69

1 A. Yes.
2 Q. -- prior to closing?
3 A. Yes.
4 Q. Do you remember when that was?
5 A. October or November of '07.
6 Q. Was there snow on the ground?
7 A. No.
8 Q. Did you fly in, drive in from Boise?
9 How did that work?
10 A. Flew into Boise, drove up.
11 Q. Did you drive with Jeff Needs?
12 A. I believe so.
13 Q. Did you talk about the transaction
14 during your drive?
15 A. Among other things, I'm sure I did.
16 Q. What did you do when you got to Idaho
17 Falls on that particular trip?
18 A. I take it back. I take it back. I
19 didn't drive up with Jeff Needs. On second -- I
20 now recall I flew into Salt Lake City and drove up
21 here and met Jeff Needs here in Ammon. And he had
22 bumped into Louis Kraml at the time, and then when
23 I arrived, he introduced me to Louis Kraml.
24 Q. So is that the meeting that you had at
25 the coffee shop?

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1 A. Yes.
2 Q. So there was a scheduled time to meet
3 with Louis Kraml at the coffee shot?
4 A. No, there wasn't. He had bumped into
5 him, I believe.
6 Q. He had already bumped into him in the
7 coffee shop?
8 A. Yes.
9 Q. You were already en route to Idaho
10 Falls?
11 A. Yes.
12 Q. Jeff Needs said he had stopped by this
13 coffee shop and said I have somebody I want you to
14 meet?
15 A. No, he didn't say that. He said I
16 want to meet you at the coffee shop.
17 Q. And that's when you talked with Louis
18 Kraml?
19 A. That's right.
20 Q. Tell me what you did when you visited
21 the property during this visit to Idaho Falls, the
22 1675 property.
23 A. We walked -- we drove around the
24 neighborhood in general.
25 Q. You and Jeff Needs?

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1 A. Yes.
2 Q. Was anyone else with you?
3 A. No.
4 Q. Okay. Continue.
5 A. And then we drove around the property
6 and looked at the building, the physical building
7 itself, the night before. The following morning we
8 visited Paul Fife's office. We had wanted to meet
9 Mr. Smith, who was in charge of The Children's
10 Center. We were told not to.
11 Q. Who told you?
12 A. Mr. Fife, Paul Fife.
13 Q. Did he tell you not to talk with him?
14 A. Not to interrupt him.
15 Q. Not to interrupt him. I think
16 Mr. Needs testified that the suggestion was they
17 didn't want the operations being interrupted with
18 the children that were there. Do you remember
19 that?
20 A. That was the impression they gave us,
21 that we were intruders and outsiders, and be
22 careful not to interrupt the operation.
23 Q. Who gave you that impression?
24 A. Paul Fife.
25 Q. Did Matt Smith give you that

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1 impression?
2 A. We did not meet Matt Smith. I asked
3 to meet Matt Smith. We went to the secretary's
4 office and asked if Matt Smith was there anyway.
5 Q. Was Paul Fife with you?
6 A. I'm not sure about that now.
7 Q. Jeff Needs was with you?
8 A. Jeff Needs was with me.
9 Q. Anybody else that was with you?
10 A. No.
11 Q. Tell me what happened when you went to
12 the secretary to ask to meet Matt Smith.
13 A. I asked if we could meet with Matt
14 Smith, if he was in, and we were told that he
15 wasn't.
16 Q. And then what did you do?
17 A. We introduced ourselves. And we asked
18 if we could walk around in general, and we were
19 told we could, and we did.
20 Q. Did you walk around the entire
21 property inside?
22 A. We did, yes.
23 Q. Did anybody accompany you and
24 Mr. Needs while you did that?
25 A. I don't recall there was anyone

1 prevent you from meeting with Matt Smith?
 2 A. It's a free world, I guess, and one
 3 could insist on seeing Matt Smith if Matt Smith
 4 were so disposed.
 5 Q. So the answer to my question is no,
 6 Paul Fife did not?
 7 MR. CROCKETT: You need to give him a
 8 chance to finish.
 9 THE WITNESS: Please. Yes. We respected
 10 the wishes of Paul Fife, and we felt that Paul Fife
 11 was representing the seller. We respected the
 12 wishes of the seller.
 13 Q. BY MR. ARMSTRONG: But you were buying
 14 the property. You were going to be taking --
 15 A. Yes.
 16 Q. -- over as the landlord of this
 17 particular tenant?
 18 A. Yes.
 19 Q. Did Paul Fife prevent you from
 20 conducting that due diligence as far as meeting
 21 with the tenant?
 22 A. In some way, yes. In some way, yes.
 23 Q. And in what way was that?
 24 A. By putting -- by persuading us to not
 25 see Matt Smith during the course of our visit. And

1 we respected his wishes.
 2 Q. But nothing prevented you after that
 3 from sending an e-mail to Matt, calling Marc
 4 Weinpel, talking with anybody that was affiliated
 5 with The Children's Center?
 6 A. No, he didn't prevent us from doing
 7 that.
 8 Q. How about Ben Arave?
 9 A. I had no contact with Ben Arave.
 10 Q. How about Jared Arave?
 11 A. I had no contact with Jared Arave.
 12 Q. Anybody else that you understood to be
 13 representing the seller, did any of those people
 14 prevent you from meeting with The Children's Center
 15 or anybody associated with The Children's Center?
 16 A. No.
 17 MR. ARMSTRONG: Handing you what we're
 18 going to mark as Exhibit *-058.
 19 (Exhibit *-058 marked.)
 20 Q. BY MR. ARMSTRONG: We're marking this
 21 as Exhibit *-058 to your deposition. Do you
 22 recognize this document?
 23 A. Yes.
 24 Q. This is the first amended verified
 25 complaint in this case, correct?

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1 A. Yes. That's what it says.
 2 Q. And if you'd turn to page 18 of this
 3 document.
 4 A. They're not numbered, I don't believe.
 5 Q. Down at the bottom after first amended
 6 verified complaint. Sorry. You're going further.
 7 Do you want me to help you out there. There you
 8 go. Is that your signature on the verification
 9 page?
 10 A. Yes.
 11 Q. And that was signed by you September
 12 30th, 2008?
 13 A. Yes.
 14 Q. And you're stating there that you've
 15 read the above and foregoing first amended verified
 16 complaint, know its contents, and you believe the
 17 facts to be true as stated in the complaint,
 18 correct?
 19 A. Yes.
 20 Q. If you'll turn to page 3 of the
 21 complaint, paragraph 7, it says: Some advertising
 22 and promotion of the subject property was published
 23 and disseminated by Paul Fife, defendants'
 24 exclusive real estate listing and selling agent,
 25 including, but not limited to, a LoopNet listing, a

1 copy of which is attached hereto as Exhibit A and
 2 made a part thereof by this reference.
 3 If you'll look at Exhibit A. It's one
 4 page after your verification page.
 5 A. You may have to help me here.
 6 MR. CROCKETT: You're going too far. These
 7 are the exhibits, and it's right after -- it's
 8 right there.
 9 THE WITNESS: I got it. Yes.
 10 Q. BY MR. ARMSTRONG: When was the first
 11 time that you saw this LoopNet advertisement?
 12 A. Again, in the fall of '07. I can't
 13 tell you a specific date.
 14 Q. Did you show this to the other
 15 investors?
 16 A. I may have. I know -- I'm sure I
 17 showed it to my wife and probably to the Donahues.
 18 I may have shown it to Chillemi and Caleb, but I'm
 19 not certain of that.
 20 Q. Do you usually rely on this kind of an
 21 advertisement in entering into a purchase and sale
 22 agreement, or do you view this as more of an
 23 enticement to look at the property a little
 24 further?
 25 A. A LoopNet advertising and listing?

DEPOSITION OF THOMAS O'SHEA - 05/12/09

SHEET 35 PAGE 137

1 the end of December 2007 --
 2 A. Yes.
 3 Q. -- on your settlement statement?
 4 A. Yes.
 5 Q. So that actually was credited to on
 6 your behalf --
 7 A. Yes.
 8 Q. -- to reduce the purchase price; is
 9 that right?
 10 A. Yes. You could say that.
 11 Q. If you'd look at tab 5, this is a
 12 duplicate document. Do you recognize that as the
 13 LoopNet?
 14 A. Yes.
 15 Q. And that was attached as an exhibit to
 16 the complaint, correct?
 17 A. Yes.
 18 Q. Look at the second page of that
 19 document. Do you recognize that document?
 20 A. Yes.
 21 Q. And do you recognize that as -- it
 22 says that it's prepared for O'Shea Family Trust?
 23 A. Yes, I see that.
 24 Q. It was created on August 7th, 2007, if
 25 you look at the bottom left-hand corner?

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1 A. Yes.
 2 Q. Do you remember getting this document
 3 on or around August 7th, 2007?
 4 A. Yes. I remember seeing that document
 5 around that time.
 6 Q. Do you know what documents Mr. Needs
 7 referred to in creating the financial summary at
 8 the top left-hand corner of that document?
 9 A. Please phrase the question again.
 10 Q. Do you know what the source of
 11 information was for Mr. Needs' financial summary at
 12 the top left-hand of that document?
 13 A. I don't know all of his sources, no.
 14 I presume he relied on this greatly.
 15 Q. It says financial summary -- I'm
 16 sorry, he relied on what?
 17 A. On this, on the LoopNet listing.
 18 Q. So you think that the LoopNet listing
 19 is the basis for his financial summary on the
 20 second page of tab 5?
 21 A. I presume he had other sources also.
 22 I don't know what they were.
 23 Q. Tax returns?
 24 A. Maybe.
 25 Q. He's getting this figure of gross

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1 income of \$299,850 from some source, correct?
 2 A. Yes.
 3 Q. You don't know what the source of that
 4 is?
 5 A. Offhand I don't know what sources he
 6 used for that. I assume that he used the LoopNet
 7 listing. I assume that he may have used
 8 information he got from Paul Fife about the
 9 building and about the income. He may have -- he
 10 may have seen a copy of the lease at that point.
 11 I'm not sure if it's too early at that point in
 12 time or not. It's not difficult to calculate the
 13 income if you know the rent per month, and if you
 14 know the cam charges per month it's not difficult.
 15 Q. So you think that may be the source of
 16 the information?
 17 A. Yes. Nor is it difficult, by the way,
 18 to calculate the cap rate that you were inquiring
 19 about earlier on. If you know the income and the
 20 expenses, it doesn't take a rocket scientist to
 21 come up with the 8 percent cap rate.
 22 Q. Sure. In fact, I think you take the
 23 net operating income, the NOI, and you divide that
 24 by the purchase price; is that correct?
 25 A. Yes.

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1 Q. And the net operating income is the
 2 income minus the expenses?
 3 A. Yes.
 4 Q. And then your figure -- the product of
 5 that would be your cap rate?
 6 A. Yeah. I don't know why it would be
 7 called puffery. You know, it's a factual -- it's a
 8 factual figure.
 9 Q. But it's based on the purchase price?
 10 A. Yes.
 11 Q. Whether the purchase price reflects
 12 value or not, that's for the parties to dicker,
 13 right?
 14 A. But the cap rate is determined by the
 15 income and the expenses.
 16 Q. Sure. Divided by the purchase price.
 17 So it's going to go up or down based on what the
 18 purchase price is?
 19 A. Yes.
 20 Q. Turn to tab 6. This is a letter from
 21 Gordon Arave dated July 15, 2008. Do you recognize
 22 that document?
 23 A. Yes.
 24 Q. Did you see this around the time that
 25 it was dated?

1062

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and
Anne O'Shea Trust u/d/t DATED
NOVEMBER 2, 1998; GRANDVIEW CREDIT,
LLC, a California limited liability
company; CALEB FOOTE, an individual,
KATE LARKIN DONAHUE, an individual,
JOHN KEVIN DONAHUE, an individual,
and SAN FRANCISCO RESIDENCE CLUB,
INC., a California corporation,

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT, LLC, an Idaho
limited liability company; GORDON
ARAVE, individually and as Member of
High Mark Development, LLC; JARED
ARAVE, individually and as Member of
High Mark Development, LLC; BENJAMIN
ARAVE; individually and as Member of
High Mark Development, LLC, and JOHN
DOES I-X,

Defendants.

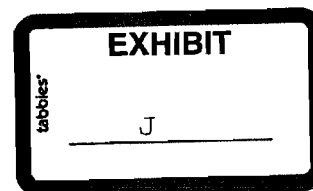
Case No.
CV-08-4025

DEPOSITION OF:
RICHARD J.
ARMSTRONG

June 10,

Sheila T. Fish
RPR, CSR

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1 continue to presume that you write this letter on
2 behalf of your client, High Mark Development, LLC?
3 A. Well, yes. I'm writing it on behalf of
4 my client, yes.
5 Q. In your capacity as High Mark's
6 attorney?
7 A. Yes.
8 Q. And related to the transaction between
9 what I'll refer to as the buyers, the O'Shea group,
10 and your client, High Mark Development?
11 A. At least part of it does looking at the
12 second page. There was another issue that had come
13 up in the interim, a Rocky Mountain bill or Rocky
14 Mountain Power bill or account that had come up
15 during the interim of the buyer buying the premises.
16 Q. Now, may I presume that any -- that you
17 were handling discussions, conversations, and
18 negotiations with Mr. Weinpel regarding the lease
19 estoppel certificate?
20 A. Handling for whom?
21 Q. High Mark.
22 A. For High Mark? Yeah, I think that's a
23 fair statement.
24 Q. Okay. Was anybody else -- my
25 understanding in general you were communicating with

1 sale had closed.
2 Q. Okay.
3 A. I remember a conversation with
4 Mr. Shiffman five to ten minutes long. He had called
5 me and I was -- after the sale had closed prior to
6 this lawsuit being filed.
7 Q. Do you recall any discussions with
8 Mr. Shiffman prior to closing on December 10, 2007?
9 A. No, I don't.
10 (Exhibit No. 7 marked.)
11 Q. BY MR. CROCKETT: Showing you what's
12 been marked as Exhibit No. 7, could you first
13 identify what it is? What is it?
14 A. This is a lease estoppel certificate
15 dated October 17, 2007, signed by Matt Smith it
16 appears on October 18th, 2007.
17 Q. Okay. And isn't that the same document
18 that you provided to Marc Weinpel for signature for
19 his clients?
20 A. I believe that I did present it to
21 Mr. Weinpel.
22 Q. Did you draft it?
23 A. Again, going back, I drafted portions
24 that were identified in the letter that I sent to
25 Mr. Weinpel.

1 Paul Fife. He was communicating with Jeff Needs and
2 you were communicating with Marc Weinpel vis-a-vis
3 the lease estoppel certificate; is that a fair
4 statement?
5 A. I think that's a compound question, and
6 I think it lacks foundation, because I don't know
7 what the discussions were between Mr. Fife and
8 Mr. Needs.
9 Q. Okay. Who did you deal with on behalf
10 of the buyers with respect to the lease estoppel
11 certificate?
12 A. No one.
13 Q. Okay. Who did you deal with with
14 respect to the lease estoppel certificate other than
15 Weinpel?
16 A. Well, Paul Fife. I would relay -- I
17 would receive messages or -- well, I don't know.
18 Q. You don't remember or you don't know?
19 A. I just don't know. I know I didn't have
20 any communications with Mr. Needs or any other buyers
21 on the estoppel certificate.
22 Q. Okay. How about an attorney in San
23 Francisco, Michael Shiffman? Did you ever talk with
24 him?
25 A. No. Well, I did talk to him after the

1 Q. Okay. Let me just ask you specifically:
2 Did you draft paragraph two?
3 A. I drafted -- I recall drafting the
4 language after the sentence "if none state none."
5 Q. Okay. Who drafted the other parts of
6 two?
7 A. I don't know.
8 Q. Could it have been you?
9 A. I don't know.
10 Q. Okay. Who drafted paragraph four, if
11 you remember?
12 A. I think I may have made changes to four
13 after it had been sent to me. I think paragraph four
14 is identified in a letter that I sent to Mr. Weinpel
15 where I had made certain modifications to it, so I
16 don't know. I think I wrote some of what is
17 contained in paragraph four.
18 Q. How about paragraph five?
19 A. Same answer.
20 Q. Okay. You had drafted portions of it?
21 A. Well, I don't know. I don't know if I
22 drafted any of paragraph five. I don't know.
23 Q. Had you, in fact, reviewed the document
24 before you sent it to Mr. Weinpel for execution by
25 his clients?

1 A. I don't know.
 2 **Q. You don't know or you don't recall?**
 3 A. I don't know and I don't recall.
 4 **Q. Okay. Well, at least to this point you**
 5 **acknowledge that you revise certain provisions in**
 6 **this specific document; correct?**
 7 A. Yes.
 8 **Q. Okay.**
 9 A. Let me clarify that too, Greg, because
 10 this document I think went through certain revisions
 11 stemming all the way back I think to September of
 12 2007. And so when you say changes made to this
 13 document I think that those changes may have
 14 transferred over into this final document that was
 15 actually signed.
 16 (Exhibit No. 8 marked.)
 17 **Q. BY MR. CROCKETT: Okay. Showing you**
 18 **what's been marked as Deposition Exhibit No. 8. Do**
 19 **you recognize what that is?**
 20 A. I do.
 21 **Q. What is it?**
 22 A. It's a letter dated October 18, 2007.
 23 It is a letter agreement, and it's dated -- the
 24 agreement portion is dated October 18, 2007.
 25 **Q. It would appear that this agreement and**

1 **portion tenant agrees to immediately sign the**
 2 **estoppel certificate dated October 17, 2007.**
 3 A. Yes.
 4 **Q. Is that the same estoppel certificate**
 5 **that is Deposition Exhibit No. 7?**
 6 A. Yes. I believe so.
 7 **Q. As I understand it in paragraph five of**
 8 **this letter agreement that it was only to be**
 9 **effective if the transaction with O'Shea actually**
 10 **went through and closed.**
 11 A. Correct.
 12 **Q. Do you agree to understand that the**
 13 **O'Shea transaction with High Mark Development did, in**
 14 **fact, go forward and close on December 10, 2007?**
 15 A. Or around that date. I recall it being
 16 December 10th, 11th, or 12th. I can't remember the
 17 exact date, but, yes.
 18 (Exhibit No. 9 marked.)
 19 **Q. BY MR. CROCKETT: Thank you. Showing**
 20 **you what's been marked as Deposition Exhibit No. 9.**
 21 **Can you describe what is it?**
 22 A. This is an e-mail from me dated
 23 October 26, 2007, to Marc Weinpel at the top and the
 24 original message is October 24, 2007, again, to Marc
 25 Weinpel.

1 **the lease estoppel certificate, which we have marked**
 2 **as Exhibit No. 7, were signed on the same date.**
 3 **Would that be a correct statement?**
 4 A. It appears that way, yes.
 5 **Q. They're both dated and signed**
 6 **October 18, 2007; correct?**
 7 A. Yes.
 8 **Q. This Exhibit No. 8 is on your firm's**
 9 **letterhead; correct?**
 10 A. Correct.
 11 **Q. Did you draft it?**
 12 A. I did.
 13 **Q. So may we presume by that fact that you**
 14 **knew and understood the contents?**
 15 A. You don't need to presume. I drafted
 16 it. I know what it says.
 17 **Q. Okay. What was, just in general, the**
 18 **intent of this agreement?**
 19 A. Well, I think it -- the intent speaks
 20 for itself through the document. I don't know what
 21 the intent is of those who signed the agreement
 22 portion. I know my intent in sending it was to relay
 23 the terms of the agreement as counsel for High Mark.
 24 **Q. Let me just ask you this: The Exhibit**
 25 **No. 8 says that paragraph two under the agreement**

1 **Q. You're the composer?**
 2 A. Yes, I am.
 3 **Q. Last sentence in the second paragraph**
 4 **says: We, therefore, anticipate that November's rent**
 5 **will need to be paid to High Mark, not the new owner,**
 6 **understanding that it would not close until December.**
 7 **Correct?**
 8 A. Correct.
 9 **Q. Then in the second paragraph you**
 10 **basically are asking when are you going to pay your**
 11 **October rent; correct?**
 12 A. Can you restate the question?
 13 **Q. Well, part of your reason for writing**
 14 **this was to apparently make inquiry of Mr. Weinpel**
 15 **about when they could expect to receive rent payments**
 16 **for October 2007 on the building at 1675 Curlew;**
 17 **correct?**
 18 A. Correct.
 19 **Q. Thank you. So by that you at least had**
 20 **knowledge at that time that their October rent had**
 21 **not been paid?**
 22 A. As of the date of this e-mail, that is a
 23 true statement.
 24 (Exhibit No. 10 marked.)
 25 **Q. BY MR. CROCKETT: Okay. Let's look at**

Marc J Weinpel

From: Rick J. Armstrong [rjarmstrong@woodcrapo.com]
Sent: Wednesday, November 07, 2007 4:43 PM
To: Marc J Weinpel
Cc: westernrealty@hotmail.com
Subject: Rent Obligation--Confidential and Privileged Settlement Negotiations pursuant to Idaho R. Evid. 408
Attachments: hm note.11.07.07.pdf

Marc:

I have left you voice mail and e-mail requesting information as to when the October and November 2007 rent and CAM charges for the Idaho Falls building will be paid in full. I have not heard anything from you on this. I am assuming that you may be out of the office and are therefore unable to communicate with me. My client has asked me to contact you to discuss the option of satisfying the Center's rent obligation for October and November 2007 on the Idaho Falls property only through issuance of a promissory note. I have taken the liberty of drafting a note to this effect and have attached it for your review and comment. Understand that the note would only defer rent payments for October and November 2007 on the Idaho Falls building, and that the Center is still required to make timely non-deferred payments for December 2007 going forward, as well as remain current in its rent obligations on the Pocatello building. Moreover, Mr. Smith's LLC is still required to make timely payments under the other outstanding note to Mr. Arave. Also, the attached note as proposed requires the first payment be made on December 1, 2007. If your client is in agreement, please contact me so that I can forward to you a signature copy of the note. It is critical that we get this situation resolved, so please put this at the top of your and Mr. Smith's list.

Thank you,

Richard J. Armstrong, Esq.
WOOD CRAPO LLC
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Tel: (801) 366-6060
Fax: (801) 366-6061
rjarmstrong@woodcrapo.com

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Transcript of the Testimony of **Jared Arave**

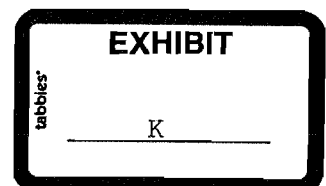
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Printed On: December 15, 2009

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Page 6

1 Q. Are you managing then the construction
2 of those buildings?
3 A. No.
4 Q. Well, who's doing that?
5 A. I help out with it.
6 Q. Do you have any other job
7 responsibilities with Arave Construction Company
8 other than what you've talked about?
9 A. Odds and ends.
10 Q. Is that a full-time job?
11 A. Yes.
12 Q. And are you then a paid employee of
13 Arave?
14 A. Yes.
15 Q. Are you also an owner?
16 A. No.
17 Q. You're not an owner. How about High
18 Mark Development, what's your involvement in High
19 Mark Development?
20 A. Part owner.
21 Q. Okay. You're a part owner. Are you
22 also an employee?
23 A. No.
24 Q. Do you have any responsibilities
25 currently with respect to High Mark at all?

Page 7

1 A. No.
2 Q. Do you know, who is the manager or
3 essentially the principal manager of High Mark
4 Development?
5 MR. ARMSTRONG: Objection, foundation.
6 THE WITNESS: I don't really know who is.
7 Possibly my father.
8 Q. BY MR. CROCKETT: And your father
9 would be whom?
10 A. Gordon Arave.
11 Q. Why are you uncertain about that,
12 Mr. Arave?
13 A. I'm just not involved with that much.
14 Q. But you are a part owner?
15 A. Yes.
16 Q. Were you, likewise, a part owner of
17 High Mark Development in 2006 and 2007?
18 A. Yes. I think so.
19 Q. During that period of time were you a
20 paid employee of High Mark?
21 A. No.
22 Q. Have you ever been a paid employee of
23 High Mark?
24 A. No.
25 Q. Do you recall that High Mark owned a

Page 8

1 professional office building located at 1675 Curlew
2 in Idaho Falls?
3 A. Repeat that. I'm sorry.
4 Q. Do you recall that in 2006, 2007 High
5 Mark was the owner of a professional office
6 building in Idaho Falls located at 1675 Curlew and
7 leased to The Children's Center?
8 A. I'm aware of that.
9 Q. Did you have anything at all to do
10 with that particular facility?
11 A. I did not.
12 Q. Did you have anything to do with the
13 construction of the facility?
14 A. No.
15 Q. Did you ever have any dealings with
16 the tenant in that building, The Children's Center,
17 Incorporated?
18 A. No.
19 Q. Did you ever have any dealings,
20 personal dealings, with Matt Smith?
21 A. No.
22 Q. Did you ever have any personal
23 dealings with Marc Weipel?
24 A. No.
25 Q. Who did deal with that facility on

Page 9

1 behalf of High Mark, if you know?
2 A. I don't know.
3 Q. Would that have been your father,
4 Gordon Arave?
5 A. Could have been.
6 Q. Was there anybody else that you know
7 of that was involved on behalf of High Mark with
8 respect to that facility?
9 A. No, I don't.
10 Q. How about your brother, Benjamin, was
11 he involved at all there?
12 MR. ARMSTRONG: Objection, foundation.
13 Q. BY MR. CROCKETT: If you know.
14 A. I'm not sure.
15 Q. You're not sure?
16 A. No. I don't know.
17 Q. Okay. Who does the bookkeeping for
18 High Mark Development?
19 MR. ARMSTRONG: Objection, foundation.
20 THE WITNESS: I don't know that.
21 Q. BY MR. CROCKETT: You don't know who
22 does the bookkeeping?
23 A. No.
24 Q. Who maintains the records for High
25 Mark Development; do you know that?

Promissory Note

Page 1 – \$199,900.00

1. Initial information

Date of Note: April 18, 2007,

Maturity Date: May 3, 2014.

Principal Sum: \$199,900.00

Annual Interest Rate: 6.75% per annum

Monthly Payments: Debtor shall make 84 equal monthly payments of \$2,992.65 to Creditor. The first monthly payment shall be due on May 3, 2007. A like monthly payment shall be made on the 1st day of each month thereafter to Lender. The entire principal and interest shall be paid in full no later than May 3, 2014.

Made at: Idaho Falls, Idaho

Debtor/Borrower: The Children's Center Inc. of Idaho Falls, Idaho

Creditor/Lender/Holder: Jared Arave & Gordon Arave of Blackfoot, Idaho.

2. Background

Lender and Borrower have entered into a loan Agreement dated April 18, 2007. Lender has agreed to lend to Borrower \$149,925.00, by means of rent deferral for the months of September, 2006 thru January, 2007. Borrower has received \$149,925.00, by means of rent deferral, and additional cash to the sum of \$49,975.00, and gives Lender this Promissory Note in exchange. By signing this promissory note Lender agrees that all past promissory notes and debt for deferred rent payments owed by Borrower to High Mark Development, LLC, Gordon Arave, or any entity in which Gordon Arave has an interest in, is cancelled and replaced by this promissory note.

3. Borrower's promise to repay

In return for the consideration of the transfer of the funds to the Corporation, Borrower promise to pay to order of Lender the Principal Sum plus interest in money of the United States of America. Lender may transfer this note; and Lender or anyone to whom this note is transferred is called the "holder."

4. Interest

Interest will be charged on the unpaid Principal Sum at the annual interest rate of 6.75% until the full amount of the principal has been paid. The interest will accrue daily and start on the Date of Note. The Annual Interest Rate required by this section is the rate before default. If there is a default, then the Default Interest Rate will apply from the date of the default until the default is cured. The Default Interest Rate is 8% per annum.

5. Payments

Beginning on May 3, 2007 and on the 1st day of the month for each following month until May 3, 2014, Borrower will make Monthly principal and interest payments as described in section 1. On May 3, 2014, Borrower will pay all amounts still owing under this note. Borrower may make a full prepayment without penalty prior to May 3, 2014. All payments whenever made will be applied in the following order: 1) interest, and 2) principal. If Borrower makes a prepayment, that will not excuse Borrower from making any other payments due under this note.

Page 2 – \$199,900.00

Borrower will make all payments to Lender's address specified above, or at a different place if required by the Lender or holder.

6. Borrower's failure to repay

Default

Borrower will be in default if:

Borrower does not make any payments under this note when due; Borrower (a) makes an assignment for the benefit of creditors, (b) files a petition in bankruptcy, (c) is adjudicated insolvent or bankrupt under the federal bankruptcy code as now or later in effect, or under any applicable state insolvency law; or if there is started against Borrower any bankruptcy, insolvency or other similar proceeding which has not been dismissed by the 60th day after the date on which the proceeding was started, or Borrower consents to or approves of any such proceeding or the appointment of any receiver for us or any substantial part of Borrower's property, or the appointment of any such receiver is not discharged within 60 days.

Acceleration

If Borrower is in default, the holder may send Borrower a written notice stating that if Borrower does not pay the overdue amount by a certain date, the holder may require Borrower to pay immediately the full amount of unpaid principal and all the accrued interest. That date must be at last sixty days after the date on which the notice is delivered or mailed.

Preservation of holder's rights

After default, even if the holder does not require Borrower to pay immediately the full amount of unpaid principal and all of the interest on the note, the holder will still have the right to do so if Borrower remains in default.

Payment of holder's costs and expenses

If Borrower is in default, the holder will have the right to be repaid by Borrower for all of its costs and expenses in enforcing this note to the extent not prohibited by applicable law. Those expenses include, but are not limited to, reasonable attorney's fees.

7. Giving the notices

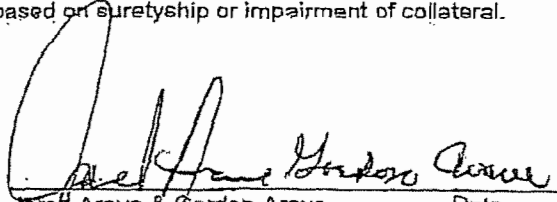
Unless applicable law requires a different method, any notice that must be given to Borrower under this note will be given by delivering it or by mailing it by first class mail to Borrower at the address shown at the beginning of this note, or at a different address if Borrower gives the holder a notice of its different address using the procedure in the next paragraph. Any notice that must be given to the holder under this note (such as, for example, a notice of different address) will be given by mailing it by first class mail to the holder at the address stated in section 1 above, or at a different address if Borrower is given a notice of that different address using the procedure in the paragraph immediately above.

8. Waivers

Borrower and any other person who has obligations under this note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require the holder to demand payment of amounts due. "Notice of dishonor" means the right to require the holder to give notice to other persons that amounts due have not been paid. Borrower waives defenses based on suretyship or impairment of collateral.

 4/18/07
Matthew F. Smith, President Date

The Children's Center Inc.

 4/18/07
Jared Arave & Gordon Arave Date

TUE/OCT/23/2007 12:51 PM THE CHILDRENS CENTER FAX No. 5291627

P. 002

WOOD CRAPO LLC

ATTORNEYS AT LAW

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LAYNE L. SMITH
RACHEL A. ASHURY

PAMELA B. HUNNATH
JOI GARDNER PEARSON
STEPHEN G. WOOD
OF COUNSEL

October 18, 2007

Via E-mail and Fax

Marc J. Weinpel, Esq.
The Children's Center, Inc.
1675 Curlew Drive
Idaho Falls, Idaho 83406
E-mail: mweinpel@thechildrenscenter.us
Facsimile: 208-529-1627

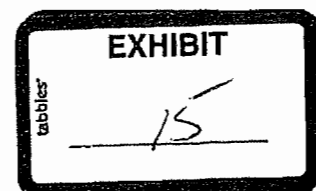
Dear Mr. [redacted]

Pursuant to our discussions this morning, I am forwarding this letter to you to memorialize the agreement between our respective clients, High Mark Development, LLC (hereinafter referred to as "Landlord") and The Children's Center, Inc. (hereinafter referred to as "Tenant"), as well as the other individuals and entities subject to the agreement we reached.

AGREEMENT

The parties agree as follows:

1. Jared Arave and Gordon Arave agree to release Tenant from the promissory note dated April 18, 2007 in the amount of \$199,900.00.
2. Tenant agrees to immediately sign the estoppel certificate dated October 17, 2007.
3. Tenant agrees to release any and all interests it has to two options to purchase set forth in two lease agreements. One agreement is with Landlord and relates to the Idaho Falls building, and the other agreement is with Crestwood Enterprises, LLC, and relates to the Pocatello building.
4. M. Smith Enterprises, LLC agrees to sign a promissory note amending the October 1, 2005 promissory note between Landlord and M. Smith Enterprises, LLC, agreeing to pay the note on an amortized payment schedule.



1071

10/23/2007 TUE 13:10 [JOB NO. 9701] 002

10/24/2007 WED 9:59 [JOB NO. 9711] 002

TUE/OCT/23/2007 12:52 PM THE CHILDRENS CENTER

FAX No. 5291627

P 003

Marc J. Weinpel, Esq.
October 18, 2007
Page 2

5. All parties to this letter agreement acknowledge and agree that this Agreement is contingent upon the closing of the sale of the Idaho Falls building on or about November 16, 2007. If the sale is not closed on or about November 16, 2007, this Agreement will terminate and the parties returned to the *status quo* that existed immediately prior to the execution of this Agreement.

If we are in agreement, please have your client sign at the appropriate spaces, and forward me a copy of the signature page for my records.

Thank you for your work on this.

Sincerely,

WOOD CRAPO LLC

Richard J. Armstrong

AGREED AND ACCEPTED this 18th day of October, 2007.

HIGH MARK DEVELOPMENT, LLC

By: Gordon Arave
Its: Manager/owner

Gordon Arave
Gordon Arave
Jared Arave
Jared Arave

THE CHILDREN'S CENTER, INC.

By: Matthew L. Smith
Its: President

M. SMITH ENTERPRISES, LLC

By: Matthew L. Smith
Its: President

1072

dated 12/15/09

HOPKINS RODEN CROCKETT
HANSEN & HOOPEs, PLLC
Gregory L. Crockett, ISBN 1640
Sean J. Coletti, ISBN 7199
428 Park Avenue
P. O. Box 51219
Idaho Falls, Idaho 83405-1219
Telephone: 208-523-4445
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE
DONAHUE O'SHEA, Trustees of the
Thomas and Anne O'Shea Trust u/d/t
DATED NOVEMBER 2, 1998;
GRANDVIEW CREDIT, LLC, a
California limited liability company;
CALEB FOOTE, an individual,
KATE LARKIN DONAHUE, an
individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB,
INC., a California Corporation;

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT,
LLC, an Idaho limited liability
company; GORDON ARAVE,
individually and as Member of High
Mark Development, LLC; JARED
ARAVE, individually and as Member
of High Mark Development, LLC;
BENJAMIN ARAVE, individually
and as Member of High Mark
Development, LLC, and JOHN DOES
I-X,

Defendants.

Case No. CV-08-4025

STATEMENT OF FACTS IN
OPPOSITION TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT

STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 1

COME NOW the Plaintiffs, by and through their counsel of record, the law firm of Hopkins Roden Crockett Hansen & Hoopes, PLLC, Idaho Falls, Idaho, and submit this Statement of Facts in Opposition to Defendants' Cross-Motion for Summary Judgment.

FACTS IN GENERAL DISPUTE

Plaintiffs incorporate in this statement of facts each and every fact as stated in their *Statement of Facts in Support of Motion for Partial Summary Judgment*, on file with the Court herein. Plaintiffs also state the following additional facts in opposition:

A. Plaintiffs relied upon the statement of Paul Fife that the Center was a good paying tenant. Paul Fife learned this information directly from Gordon Arave.

1. At deposition, Paul Fife stated that Gordon Arave told him that Matthew Smith of the Center had "always paid on time and he hadn't had any real problems with him.":

Q. Did you ever have any discussions with Mr. Arave concerning the financial stability of the tenant, The Children's Center?

A. Not directly, no.

Q. Any indirect communications about that?

A. **Gordon indicated that he had always paid on time and he hadn't had any real problems with him.**

Q. And he expressly told you that?

STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 2

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. Do you remember when he would have said that?

A. Exact date, no. During our listing agreement.

Deposition of Paul Fife, p. 29, l. 16 – p. 30, l. 5 (Second Coletti Affidavit, Exh. A)

(emphasis added).

2. Paul Fife relayed this information to Jeff Needs:

Q. As a representative for Mr. O'Shea, how much did you rely on that 8 percent cap rate that was stated in the LoopNet ad?

A. Very little. I relied mostly on the lease.

Q. When you say you relied on the lease, are you talking about what was stated in the lease agreement?

A. What's stated in the lease agreement, the fact that **the tenant we had been told was a strong tenant, had been paying every monthly rent on time, in a timely manner, had been a great tenant.** So, that had more weight than a cap rate.

Q. Who told you that, that the tenant was –

A. It was marked as that in the LoopNet advertisement and **we were told that by Paul Fife.**

Q. When did Paul Fife tell you that?

A. At some point during the time when we were looking at – before closing.

Deposition of Jeffrey L. Needs, p. 88, l. 25 – p. 89, l. 11 (*Second Coletti Affidavit*, Exh. B) (emphasis added).

B. Both Gordon Arave and Paul Fife believed that Fife was acting as the agent for Gordon Arave.

1. Gordon Arave believed that Paul Fife was acting as his agent:

Q. If Mr. Armstrong transferred it on to Mr. Fife, I presume Mr. Fife thereupon would have been still acting as your agent, correct?

A. He was acting as my agent through this transaction, or our agent.

Q. And would he have been authorized on your behalf to convey or deliver the estoppel certificate to your buyers and their agent, Mr. Needs?

A. He would have been the party that all things were communicated to for that purpose, yes.

Q. So he was authorized to do that?

A. He – yes, I guess.

Deposition of Gordon Arave, p. 76, l. 19 – p. 77, l. 6 (*Second Coletti Affidavit*, Exh. C).

2. Paul Fife also apparently believed he was acting as Gordon Arave's agent through the transaction:

Q. Who were you the agent for?

A. Arave or High Mark Development.

Q. Did you also represent Gordon Arave?

A. Correct.

Deposition of Paul Fife, p. 6, ll. 7-10 (*Second Coletti Affidavit*, Exh. A).

C. Richard Armstrong made revisions to the final Estoppel Certificate.

Defendants contend that Plaintiffs' attorney wrote the Estoppel Certificate.

However, Defendants' attorney, Richard Armstrong, admits that he had his hand on the document:

A. This is a lease estoppel certificate dated October 17, 2007, signed by Matt Smith it appears on October 18, 2007.

....

Q. Did you draft it?

A. Again, going back, I drafted portions that were identified in the letter that I sent to Mr. Weinpel.

....

Q. Okay. Well, at least to this point you acknowledge that you revised certain provisions in this specific document; correct?

A. Yes.

Deposition of Richard J. Armstrong, p. 47, l. 14 – p. 49, l. 7 (*Second Coletti Affidavit*, Exh. J).

STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 5

D. The Plaintiffs each relied on fraudulent information and documents provided by the Defendants.

In addition to communications with Tom O'Shea who was handling most of the negotiations, the individual Plaintiffs also relied heavily on the specific fraudulent information and documents that were provided by the Defendants. Statements to this regard from Tom O'Shea have already been provided in Plaintiffs' *Statement of Facts in Support of Motion for Partial Summary Judgment*.

1. *Anne O'Shea.*

Anne O'Shea reviewed the LoopNet listing and the Estoppel and relied on the same. *See Deposition of Anne Donahue O'Shea*, p. 10, ll. 6-18; p. 86, l. 10 – p. 87, l. 4 (*Second Coletti Affidavit*, Exh. D). According to Anne, "It's just the confirmation or representations that, you know, yes, this is a tenant; yes, they have a lease; yes, the lease is in full force; yes, they're – you know, there are no defaults; yes, they're paying the rent." *Id.*, p. 86, l. 25 – p. 87, l. 4.

2. *Kevin Donahue.*

Kevin Donahue relied on "the listing information, the financial information, [and] the Estoppel information" in deciding to invest in the property. *Deposition of Kevin Donahue*, p. 46, ll. 7-15 (*Second Coletti Affidavit*, Exh. E). He trusted Tom O'Shea's review and interpretation that the Estoppel confirmed that "the tenant was not in default"

and “all minimum monthly rent had been paid[,]” both of which were false. *Id.*, p. 47, l. 10 – p. 48, l. 21.

3. *San Francisco Residence Club and Kate Donahue.*

San Francisco Residence Club and Kate Donahue likewise decided to invest based on review of the LoopNet ad (*Deposition of Kate Donahue*, p. 34, l. 9 – p. 35, l. 9), and the Estoppel (p. 50, ll. 15-18). As stated by Kate:

Q. You felt like they performed due diligence on behalf of the group the way they should have?

A. That they performed due diligence? They received different documents and then that’s what we relied on.

Id., p. 80, ll. 20-25 (*Second Coletti Affidavit*, Exh. F).

4. *Grandview Credit.*

Jack Chillemi, principal for Grandview Credit, reviewed the LoopNet ad (*Deposition of Jack Anthony Chillemi*, p. 28, l. 20 – p. 29, l. 5), and the faxed document from High Mark stating that the Center had paid all of its rent from June 2006 through July 2007. *Id.*, p. 40, l. 11 – p. 42, l. 12 (*Second Coletti Affidavit*, Exh. G).

5. *Caleb Foote.*

Caleb Foote reviewed the LoopNet ad and financial information from Paul Fife containing “income statements that all rents were being paid on a current basis and there were no defaults.” *Deposition of Caleb Foote*, p. 13, l. 25 – p. 14, l. 5. He also

reviewed the Estoppel (*Id.*, p. 24, ll. 2-13), and the fax showing rent received from June 2006 through July 2007. *Id.*, p. 42, ll. 3-16. Caleb said, “Looked like all rents had been paid and that the building maintenance, expenses and everything else had been paid.” *Id.* (*Second Coletti Affidavit*, Exh. H).

E. Plaintiff Tom O’Shea visited and inspected the property and attempted to meet with Matthew Smith, but was told by Paul Fife not to bother him.

Plaintiff Tom O’Shea visited and inspected the property, but was told by Paul Fife not to meet with Matthew Smith so as not to “interrupt”:

Q. Tell me what you did when you visited the property during this visit to Idaho Falls, the 1675 property.

A. We walked – we drove around the neighborhood in general.

Q. You and Jeff Needs?

A. Yes.

Q. Was anyone else with you?

A. No.

Q. Okay. Continue.

A. And then we drove around the property and looked at the building, the physical building itself, the night before. The following morning we visited Paul Fife’s office. We had wanted to meet Mr. Smith, who was in charge of The Children’s Center. We were told not to.

Q. Who told you?

A. Mr. Fife, Paul Fife.

Q. Did he tell you not to talk with him?

A. Not to interrupt him.

Q. Not to interrupt him. I think Mr. Needs testified that the suggestion was they didn't want the operations being interrupted with the children that were there. Do you remember that?

A. That was the impression they gave us, that we were intruders and outsiders, and be careful not to interrupt the operation.

Q. Who gave you that impression?

A. Paul Fife.

Q. Did Matt Smith give you that impression?

A. We did not meet Matt Smith. I asked to meet Matt Smith. We went to the secretary's office and asked if Matt Smith was there anyway.

Deposition of Thomas O'Shea, p. 70, l. 20 – p. 72, l. 4 (Second Coletti Affidavit, Exh. I).

Jeff Needs also testified that the inspection occurred, but they could not meet with Matt Smith:

Q. All right. So you were there for that site inspection for less than an hour?

A. Correct.

Q. Did you ask anyone to be able to sit down with the tenant or a tenant's representative to talk about their business, their revenues?

A. We had asked to meet with Matt Smith and we were told that he wouldn't be available to meet with us.

Deposition of Jeffrey L. Needs, p. 82, ll. 11-19 (Second Coletti Affidavit, Exh. B).

F. Plaintiffs did conduct a thorough inspection of the property, as evidenced by the addenda to the Agreement.

This information is contained in Exhibit P to the *Affidavit of Richard J.*

Armstrong:

Addendum # 2: **Building Inspection:** Buyer, at Buyer's sole cost, shall contract to obtain a site inspection report. The report shall be completed and approved by Buyer on or before September 21, 2007. Should the report be unsatisfactory to Buyer for any reason, Buyer may terminate this Agreement and receive a full refund of Earnest Money.

Addendum # 4: **Building Inspection:** Buyer has completed its inspection of the property noting several minor items for repair. Seller has agreed to make the repairs at Seller's cost prior to Closing. Should the repairs not be completed by Closing, Seller agrees to leave \$5,000 in escrow until repairs are completed. If repairs are not completed within 30 days of Closing, Buyer shall receive the \$5,000 from escrow and make repairs itself. Other than these repair items, Buyer removes Building Inspection contingency.

G. Paul Fife never told the Plaintiffs that the released note was for unpaid rent.

Even if the Plaintiffs had learned of certain consideration in exchange for release of the option to purchase in the tenant's lease, Defendants still did not disclose the material fact that the released note was for unpaid rent:

Q. Did you know what the promissory note was all about?

A. Did not.

Q. Did you have any indication it was for nonpayment of rent or for rent deferral, so to speak?

A. No, sir.

Q. So that wasn't communicated to Needs?

A. No.

Deposition of Paul Fife, p. 51, l. 25 – p. 52, l. 7 (Second Coletti Affidavit, Exh. A).

H. The November 7, 2007 Promissory Note was for unpaid and expected rent from the Center.

The November 7, 2007 Promissory Note was intended to cover unpaid rent that High Mark and Gordon Arave had expected, but had not received, apparently in a hurry to be ready for closing:

My client has asked me to contact you to discuss the option of satisfying the Center's rent obligation for October and November 2007 on the Idaho Falls property only through issuance of a promissory note. I have taken the liberty of drafting a note to this effect and have attached it for your review and comment. Understand that the note would only defer rent payments for October and November 2007 on the Idaho Falls building, and that the Center is still required to

STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 11

make timely non-deferred payments for December 2007 going forward, as well as remain current in its rent obligations on the Pocatello building.

Armstrong Depo., Exh. 11 (*Second Coletti Affidavit*, Exh. K).

I. The Rescission letter.

The rescission tender letter in this case occurred on October 3, 2008, and stated as follows:

Plaintiffs hereby tender the Ammon property to Defendants in order to completely restore the parties' to their respective pre-contract positions. Tender of the property is conditioned on the payment of all sums and amounts expended by the Plaintiffs in conjunction with the transaction. This constitutes our tender of all consideration related to the transaction by appropriate instrument of conveyance. This offer is made with the intent that the parties' contract of sale be rescinded due to Defendants' failure to inform the Plaintiffs that the tenant, The Children's Center, Inc., was not paying its monthly rent. Plaintiffs will dismiss the Complaint against the Defendants in return for acceptance of this offer.

Gordon Depo., Exh. 26 (*Second Coletti Affidavit*, Exh. C).

J. Gordon Arave provided fraudulent information to Fife that ended up in the LoopNet ad.

1. Gordon was the one responsible for listing the property with Paul Fife. *Deposition of Gordon Arave*, p. 27, ll. 3-6 (*Second Coletti Affidavit*, Exh. C).

2. Gordon provided fraudulent information to Fife that ended up in the LoopNet ad. *Id.*, p. 28, l. 21 – p. 29, l. 17.

3. Gordon did not disclose information about the Center's non-payment of rent to Paul Fife, although he knew that the rent deferral notes existed and ran contrary to the statements made in the Estoppel and other documents regarding the payment of rent. *Id.*, p. 98, ll. 18-24, p. 102, ll. 4-17.

4. Gordon was also careful not to disclose the purpose of the April 18, 2007 promissory note to Paul Fife. *Deposition of Paul Fife*, p. 51, l. 25 – p. 52, l. 7 (*Second Coletti Affidavit*, Exh. A).

5. After the transaction was completed and the Center had left the premises, Gordon represented to Needs and Tom O'Shea that he knew nothing of any problems with the Center. *See Needs Depo.*, Exh. 61 (*Second Coletti Affidavit*, Exh. B).

K. Jared Arave provided and concealed fraudulent information from the Plaintiffs.

1. Jared Arave is a part owner of High Mark Development. *Deposition of Jared Arave*, p. 6, ll. 17-20 (*Second Coletti Affidavit*, Exh. K).

2. Jared knew that the Center had not paid all of its rent, as evidenced by his signature on the April 18, 2007 promissory note. *Id.*, Exh. 6.

3. Jared kept track of any payments made on that note. *Gordon Deposition*, p. 49, ll. 7-9 (*Second Coletti Affidavit*, Exh. C).

4. Jared knew that the rent for the months of September 2006 through January 2007 was never paid, as evidenced by his signature on the Agreement dated

October 18, 2007. *Deposition of Jared Arave*, Exh. 15. Jared never informed the Plaintiffs that the information provided in the Estoppel was false.

L. Tom O'Shea saw the LoopNet ad **before** signing the Purchase and Sale Agreement.

Defendants claim that Tom O'Shea first saw the LoopNet ad after the Purchase and Sale Agreement had been signed. Tom actually stated as follows:

Q. When was the first time that you saw this LoopNet advertisement?

A. Again, in the fall of '07. I can't tell you a specific date.

Deposition of Thomas O'Shea, p. 80, ll. 10-13. Later on, Tom clarified:

Q. Do you remember getting this document on or around August 7, 2007?

A. Yes. I remember seeing that document around that time.

Id., p. 138, ll. 2-5 (*Second Coletti Affidavit*, Exh. I).

M. The faxed document showing rent received from June 2006 to July 2007 as \$324,836.00 was sent from High Mark Development.

At his deposition, Gordon Arave confirmed that the document showing all rent had been paid by the Center was sent from High Mark Development:

Q. Handing you what's been marked as Deposition Exhibit No. 10. Do you recognize the document?

A. Can't say as I do, but –

Q. It comes from your office though, doesn't it, don't you agree?

MR. ARMSTRONG: Objection, foundation.

Q. Doesn't the top of the fax indicate that it was faxed –

A. It says that it was faxed from my office (Arave Construction).

Deposition of Gordon Arave, p. 57, l. 17 – p. 58, l. 2 (Second Coletti Affidavit, Exh. C).

N. Matthew Smith told Scott Williams that the Center was headed for demise.

Matt Smith testified that he told Scott Williams, an agent and owner of High Mark Development, that the Center was headed for demise:

Q. Did you ever tell Mr. Arave that though, that you were pretty sure you were going down?

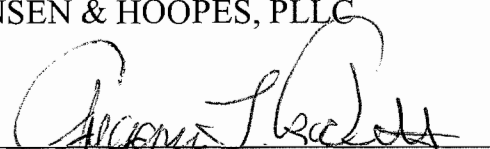
A. I didn't tell Gordon that. I told Scott that.

Deposition of Matthew F. Smith, p. 104, ll. 8-12 (Attached as Exh. C to Supplemental Affidavit of Richard J. Armstrong).

DATED this 15th day of December, 2009.

HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC

By: _____

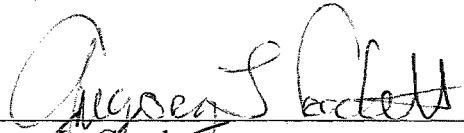

Gregory L. Crockett
Attorneys for the Plaintiffs

STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 15

CERTIFICATE OF SERVICE BY MAIL, HAND DELIVERY
OR FACSIMILE TRANSMISSION

I hereby certify that a true and correct copy of the foregoing document was on this date served upon the persons named below, at the addresses set out below their name, either by mailing, hand delivery or by telecopying to them a true and correct copy of said document in a properly addressed envelope in the United States mail, postage prepaid; by hand delivery to them; or by facsimile transmission.

DATED this 15th day of December, 2009.



Gregory L. Crockett

Richard J. Armstrong, Esq.
Wood Crapo LLC
500 Eagle Gate Tower
60 East South Temple, Suite 500
Salt Lake City, Utah 84111

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☐ Hand Delivery
☐ Facsimile

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STATEMENT OF FACTS IN OPPOSITION TO DEFENDANTS' CROSS-MOTION
FOR SUMMARY JUDGMENT - 16

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BONNEVILLE COUNTY
IDAHO

2009 DEC 16 AM 10:35

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC, and JOHN DOES I-X,

Defendants.

***MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT***

Case No. CV-08-4025

Judge Joel Tingey

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC,

Third-Party Plaintiffs,

v.

THE CHILDREN'S CENTER, INC., an Idaho
corporation; THE IDAHO CHILDREN'S
CENTER, INC., an Idaho corporation,

Third-Party Defendants.

INTRODUCTION

The plaintiff investors are not entitled to summary judgment. As a matter of law, the plaintiff investors are not entitled to judgment on any of their five claims for relief. The plaintiff investors were the first to breach the purchase and sale agreement, therefore, they are not entitled to relief under Counts I and II of their amended complaint. The plaintiff investors are unable to prove the nine elements of their fraudulent misrepresentation claim. There was no legal duty that arose on the part of any Defendant to disclose that some of the rent for the property at issue had been collected in the form of promissory notes. Even if a duty to speak existed, this duty was satisfied by Defendants. At the very least, the plaintiff investors are unable to show an absence of disputed material facts relating to the question of the plaintiff investors' reliance on the alleged misrepresentations. Summary judgment in favor of the plaintiff investors is therefore inappropriate.

STANDARD OF REVIEW

Summary judgment is proper when “there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.” *Alpine Packing Co., v. H.H. Keim Co., Ltd.*, 828 P.2d 325, 326 (Idaho Ct. App. 1991). When deciding whether to award summary judgment, a court looks to the “pleadings, depositions, and admissions on file, together with the affidavits, if any.” Idaho R. Civ. P. 56(c). The presence of unresolved issues of material fact precludes summary judgment. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 160 P.3d 743, 746 (2007).

ARGUMENT

To avoid duplication, Defendants incorporate herein the arguments set forth in their memorandum in support of their cross motion for summary judgment. Defendants’ arguments in that memorandum set forth reasons for granting Defendants summary judgment on each of the plaintiff investors’ claims. For those same reasons, the plaintiff investors’ motion for partial summary judgment should be denied.

In addition to the reasons set forth in Defendants’ moving papers, the plaintiff investors have not shown the Court their entitlement to summary judgment for various reasons. As set forth in Defendants’ response to the plaintiff investors’ factual statements, there are a number of errors in the plaintiff investors’ factual citations. For example, the plaintiff investors continuously refer to Gordon Arave individually when referencing obligations and actions of High Mark Development, LLC and other related companies, including the construction of the various properties that had been leased by the Children’s Center, Inc. and its related entities, entering into contracts with the Children’s Center, Inc., and receiving rent checks. *See, e.g., Plaintiffs’ Statement of Facts in Support of Motion for Partial Summary Judgment*, at pp. 3, 4, 5,

8, 9, 10, 13, 17. The plaintiff investors knew the distinction between High Mark and Gordon Arave and to argue otherwise ignores the plaintiff investors' communications before closing. In the September 6, 2007 fax from Jeff Needs to Paul Fife, Needs informs Fife that the plaintiff investors wanted Gordon Arave to sign an indemnification in addition to High Mark. *See* Ex. E. Needs explains the plaintiff investors want Gordon Arave's personal indemnification because they do not know what the "Seller" has *vis-a-vis* assets, and whether it will be an operating entity through the end of the lease term in 2016. *See id.* Needs' fax clearly shows the plaintiff investors knew the seller was a distinct entity and separate from Gordon Arave.

At the very least, genuine disputes of material fact exist relating to the plaintiff investors' claim of fraudulent misrepresentation and concealment. Scott Williams was not told by Marc Weinpel, Matt Smith or anyone else the Children's Center was unable to pay its rent and CAM charges, or that it was considering bankruptcy. Mr. Smith also did not tell Scott Williams the Children's Center was headed for demise or the Children's Center was leaving the property at 1675 Curlew. *See* Ex. F. Matt Smith testified he never told Gordon Arave the Children's Center was headed for demise. *See* Ex. C, at 104:8-11. The alleged conversation between Marc Weinpel, Matt Smith, and Scott Williams occurred in December 2007 and lasted five minutes. *See* Ex. C, at 104:22-105:7; 106:1-2. Matt Smith described the conversation by stating that "[Scott Williams] wanted to collect rent. And we just leveled with him and said, you know, it's not going to happen, that we can't, and all likelihood is we were going to be filing bankruptcy." *See id.*, at 107:7-11. Matt Smith then changed his testimony in his deposition by testifying that he suddenly remembered telling Scott Williams in that conversation that the Children's Center was going to vacate the property. *See id.*, at 108:3-109:16. Marc Weinpel, on the other hand, does not remember telling Scott Williams that the Children's Center was going to abandon the

1675 Curlew Drive property, stating only that he and Matt Smith told Mr. Williams that the Children's Center was unable to pay the amount of rent and CAM charges, and that it was "possibly" going to consider filing for bankruptcy protection. *See* Ex. G, at 44:19-22.

Importantly, the Children's Center never informed Defendants it was going to vacate the 1675 Curlew property or that it had entered into a lease at 1975 Martha Avenue in Idaho Falls. *See* Ex. C, at 104:8-11.

In December 2007, the Children's Center's conduct substantiated its business plan to consolidate its operations in the 1675 Curlew Drive property. It is undisputed that on February 7, 2008, the Children's Center, Inc. re-affirmed and passed a corporate resolution it entered into on December 20, 2007, which related to a management contract between the Children's Center and Advanced Practice Management, Inc. *See* Ex. C, at 133:21-134:6. According to the Children's Center, Advanced Practice Management was a management company the Children's Center had hired to manage the business affairs of the Children's Center, including managing the staff, the payroll, legal, and other "business affairs type operations." *See id.*, at 134:7-15. According to Mr. Smith, Advanced Practice Management was to be housed at the 1675 Curlew Drive property with the Children's Center. *See id.*, at 135:2-20.

There is a genuine dispute of material fact relating to the justifiable reliance of the plaintiff investors on Defendants' alleged misrepresentations. *See* Ex. H. Robert Miller testifies he has worked extensively in the commercial real estate industry, and is therefore familiar with industry standards relating to estoppel certificates, their purpose, and whether such certificates are typically relied on by buyers of commercial real estate for the purpose of supplanting, superceding, or replacing independent review and analysis of real estate and tenants occupying the real estate. *See id.*

Based on his experience, Mr. Miller is also familiar with the industry standard for conducting due diligence in relation to purchasing commercial real estate. *See id.* According to Mr. Miller, it is standard in the industry for a purchaser of commercial real property to conduct a thorough investigation of its purchase prior to closing on that purchase. *See id.* Such thorough investigation includes a visual inspection of the property, as well as a building inspection by an appropriate engineer or other professional. *See id.* If the commercial property is occupied by a pre-existing commercial tenant, an appropriate and thorough investigation also requires the purchaser to meet and talk with the tenant, to meet and talk with the owner, to evaluate all relevant financial information relating to the tenant, including but not limited to the tenant's balance sheet, an appropriate credit report on the tenant, all judgments and bankruptcies pertaining to the tenant, income and expense statements, aged receivables reports, appraisals, tax returns, profit and loss statements, and other relevant financial information. *See id.*

Mr. Miller has reviewed the depositions of Jeff Needs and Thomas O'Shea. He has read in those depositions that the only financial information Messrs. Needs and O'Shea reviewed in relation to the tenant was limited to 2005 and 2006 federal income tax returns of the tenant, and the tenant's partial profit and loss statement from January 2007 to June 2007. *See id.*

Some of the plaintiff investors only reviewed two pages from each of the 2005 and 2006 federal income tax returns and the partial profit and loss statement, while other plaintiff investors did not review any financial information related to the tenant and did not ask to review financial information related to the tenant. *See id.* Mr. Miller also understands from his review of the depositions of Messrs. Needs and O'Shea that none of the plaintiff investors met or talked with the tenant prior to closing, despite Mr. O'Shea testifying in his deposition that he felt it was

important for him to meet and talk with the tenant prior to closing in order to discuss the tenant's business plan and other aspects of the tenant's business. *See id.*

Based on these facts, it is Mr. Miller's opinion that the plaintiff investors failed to conduct a thorough investigation of their purchase of the 1675 Curlew property, and therefore could not have justifiably relied on any alleged misrepresentations of the seller. *See id.*

The plaintiff investors did not and could not have justifiably relied on any alleged misrepresentations because they did not conduct the due diligence that was required of them under paragraph 9 of the real estate purchase contract, or as required of the plaintiff investors by way of industry standards governing their performance of due diligence. *See id.*

It is also Mr. Miller's opinion that it is not standard in the industry for California purchasers of commercial real estate to rely on an estoppel certificate to the extent claimed by the plaintiff investors in this case. *See id.* Messrs. Needs and O'Shea both testified in their depositions they felt the limited financial information they reviewed in relation to the tenant was adequate due diligence on their part in light of representations made in the October 17, 2007 estoppel certificate, which was signed by the tenant. *See id.*

It was unreasonable for the plaintiff investors to rely heavily or primarily on *any* estoppel certificate as an excuse to not meet with the tenant or the owner prior to closing, or to conduct the other aspects of their due diligence that were required of them under paragraph 9 of the real estate purchase contract and industry standard. In my opinion, the plaintiff investors were unjustified in relying on the estoppel certificate to the extent they did. *See id.*

In the commercial real estate industry, an estoppel certificate generally serves the limited purpose of making the buyer aware that a tenant occupies the premises, and that a lease agreement has been signed. It is *not* standard in the industry for a buyer of commercial real

estate to rely on an estoppel certificate for the purpose of determining the solvency or credit worthiness of a tenant, especially when the investment is \$3.7 million, involves an existing commercial tenant that has only occupied the property for less than 18 months prior to the purchase, and the term under the existing lease agreement is ten years. *See id.*

In such a situation, it is imperative on the part of the purchaser to conduct a thorough investigation into the tenant to determine its credit worthiness and its current and long term financial health. *See id.* Mr. Miller opines that none of the plaintiff investors or their representatives conducted any such thorough investigation into the tenant. Therefore, none of the plaintiff investors justifiably relied on any alleged misrepresentations of the seller or its agents. *See id.*

Given these genuine factual disputes, the plaintiff investors are not entitled to summary judgment.

Citing to *American Jurisprudence*, the plaintiff investors argue that Defendants made secret rent concessions with the Children's Center and that failure to disclose those rent concessions constitutes fraud. The plaintiff investors have misquoted *American Jurisprudence*, to the extent they have not quoted the entire paragraph. *American Jurisprudence* goes on to state as follows:

It has been held, however, that if a statement concerning rentals is false, in that a tenant under a signed lease is paying less than the amount called for by the lease, the concealment or misrepresentation is not harmful and is not sufficiently material to justify a rescission of a contract for the sale of the property where the lessee is able, and is legally required, to pay the rent prescribed by the lease.

See 37 Am. Jur. 2d, *Fraud and Deceit*, § 228 (2001) (citing *Exchange Realty Co. v. Bines*, 18 N.E.2d 425 (Mass. 1939), *overruled on other grounds by Nalbandian v. Hanson Restaurant & Lounge, Inc.*, 338 N.E.2d 335 (Mass. 1975)).

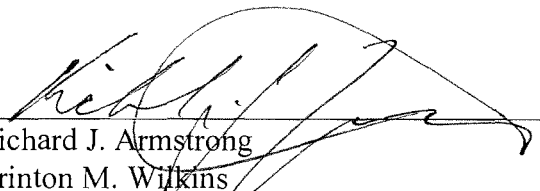
American Jurisprudence supports Defendants in this case. Despite any so-called rent-concessions, the Children's Center was legally required to pay rent to the plaintiff investors upon their taking title to the property. The only change in the lease agreement, i.e., the release of the tenant's option to purchase, was clearly communicated to the plaintiff investors. The failure to disclose the so-called rent concessions is therefore not harmful and does not constitute fraud.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Defendants' cross motion for summary judgment, Defendants respectfully request that the Court deny the plaintiff investors' motion for partial summary judgment.

RESPECTFULLY SUBMITTED this 14th day of December, 2009.

WOOD CRAPO LLC



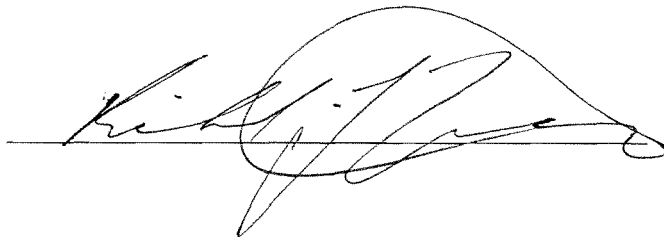
Richard J. Armstrong
Brinton M. Wilkins
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2009, a true and correct copy of the foregoing ***MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT*** was served by email and U.S. mail, postage prepaid, to the following:

HOPKINS RODEN CROCKETT HANSEN & HOOPES, PLLC
Gregory L. Crockett
Sean J. Coletti
428 Park Avenue
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seancoletti@hopkinsroden.com
gregcrockett@hopkinsroden.com

Marc J. Weinpel
1975 Martha Avenue
Idaho Falls, Idaho 83404
mweinpel@familytc.us

A handwritten signature in black ink, appearing to read "Mark J. Weinpel", written over a horizontal line.

S:\WPDATA\PLEADING\HIGH MARK O'SHEA.MEMO-OPPOSITION TO MOTION FOR PART SUMMARY JUDGMENT.wpd

BONNEVILLE COUNTY
IDAHO

2017 DEC 16 AM 10:35

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC, and JOHN DOES I-X,

Defendants.

**STATEMENT OF FACTS IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Case No. CV-08-4025

Judge Joel Tingey

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC,

Third-Party Plaintiffs,

v.

THE CHILDREN'S CENTER, INC., an Idaho
corporation; THE IDAHO CHILDREN'S
CENTER, INC., an Idaho corporation,

Third-Party Defendants.

Pursuant to Idaho R. Civ. P. 56(b), Defendants High Mark Development, LLC,
Gordon Arave, Jared Arave, and Benjamin Arave, hereby submit the following *Statement of
Material Facts in Opposition to Plaintiffs' Motion for Partial Summary Judgment*.

**STATEMENT OF MATERIAL FACTS AS TO WHICH
MOVANTS CONTEND A GENUINE DISPUTE EXISTS¹**

To avoid duplication, Defendants incorporate herein by reference all of their
factual statements set forth in their statement of fact in support of their cross motion for summary
judgment. In addition to those facts, Defendants offer the following factual statements in
opposition to the plaintiff investors' motion for partial summary judgment.

1. In 2002, the Children's Center, Inc. began renting property from entities
related to Defendant High Mark Development, LLC. *See* Deposition of Gordon Arave, 19:2-12,

¹Unless stated otherwise, the discovery materials cited herein are attached as exhibits to the Supplemental
Affidavit of Richard J. Armstrong, ("Supp. Armstrong Affidavit"), which is filed contemporaneously herewith.

attached as Exhibit A to Supp. Armstrong Affidavit; *Def's ' Objections and Responses to Pls ' First Discovery Requests*, Answer to Inter. No. 7, attached as Exhibit B.

2. The Children's Center, Inc. never entered into a lease agreement with Defendant Gordon Arave. *See* Ex. B.

3. The lease agreement relating to the 1675 Curlew Drive property is signed by the Children's Center, Inc. and High Mark Development, LLC. Defendant Gordon Arave did not sign the lease agreement in his personal capacity. *See* Lease Agreement, attached as Ex. I to Armstrong Affidavit dated November 24, 2009.

4. The property located at 1619 Curlew in Idaho Falls was leased to M. Smith Enterprises, LLC by Crestwood Enterprises or High Mark Development, LLC, not Defendant Gordon Arave. *See* Ex. A, at 16:8-22.

5. Defendant Gordon Arave never constructed any building for the Children's Center. The construction of 1675 Curlew Avenue, Ammon, Idaho was performed by Arave Construction, Inc., a non-party to this litigation. *See* Ex. A, at 23:7-16.

6. Under the lease agreement at the 1619 Curlew building, the tenant was given a six month period of time where rent payments were not required. *See* Ex. A, 37:4-10.

7. Gordon Arave explained:

When we went to Pocatello and built that building for [the Children's Center], the same thing occurred. He asked for that. We structured it in our costs and built him a building that gave him six months. He had six months to get his work up and running before any rent was collected. When we built the building at 1675 Curlew, I objected to that process because he had been in this business for some time then and I didn't feel that it was necessary, and he agreed to that and signed the lease to that extent.

Ex. A, 37:11-21.

8. Mr. Arave continued:

As we got into [1675 Curlew]- - [the Children's Center] did approach me and said that because he was hiring psychiatrists and other expenses that had not been previously foreseen, asked for the same application to be made in this case on that building. We subsequently did agree to do that to accommodate Mr. Smith. He had paid well and we wanted to give him an opportunity to be successful. So we agreed to work that out with him to spread that period of time over a longer period of time. We didn't forgive any rent but he needed time to make the business work in Idaho Falls, and so we did agree to that.

Ex. A, 37:22-38:10.

9. The Children's Center paid rent and CAM charges in the months of May, June, July, August, and September 2007. *See* Deposition of Matt Smith, at 17:18-18:1; 50:15-23, attached as Exhibit C to the Suppl. Armstrong Affidavit, and History of Payments from the Children's Center, attached as Exhibit D to Suppl. Armstrong Affidavit.

10. Gordon Arave did not enter into the purchase agreement with the plaintiff investors. As found by this Court in its September 26, 2008 *Memorandum Decision and Order*, the seller of the property in question was High Mark Development, LLC, not Gordon Arave, as identified in the purchase agreement. *See* Ex. 1 to Armstrong Affidavit dated November 24, 2009.

11. On September 6, 2007, Jeff Needs faxed Paul Fife, stating that the plaintiff investors wanted Gordon Arave to provide a personal indemnification against the tenant's option to purchase. As explained by Mr. Needs in his fax, the plaintiff investors wanted this "because *we have no idea what assets Seller has*, or if it will be an operating entity through . . . 2016." *See* September 6, 2007 Fax from Jeff Needs to Paul Fife, attached as Exhibit E to Suppl. Armstrong Affidavit (emphasis added).

12. The individual defendants Gordon Arave, Jared Arave, and Ben Arave did not draft or send to the plaintiff investors the financial information related to the tenant

referenced by the plaintiff investors in their moving papers. Specifically, the individual defendants did not send to the plaintiff investors the so-called financial document stating that High Mark had received \$324,836 in rent from June 2006 through July 2007. *See* Ex. A, 57:17-59:6.

13. In testifying about this document, Gordon Arave testified he did not recognize the document, Ex. A, at 57:17-20, was not familiar with the document, *id.*, at 58:4-8, and did not know where it came from. *See id.*, at 59:2-3.

14. Scott Williams was not told by Marc Weinpel, Matt Smith or anyone else the Children's Center was unable to pay its rent and CAM charges, or that it was considering bankruptcy. Mr. Smith also did not tell Scott Williams the Children's Center was headed for demise or the Children's Center was leaving the property at 1675 Curlew. *See* Affidavit of Scott Williams, attached as Exhibit F to Suppl. Armstrong Affidavit.

15. Matt Smith testified he never told Gordon Arave the Children's Center was headed for demise. *See* Ex. C, at 104:8-11.

16. The alleged conversation between Marc Weinpel, Matt Smith, and Scott Williams occurred in December 2007 and lasted five minutes. *See id.*, at 104:22-105:7; 106:1-2.

17. Matt Smith described the conversation: "[Scott Williams] wanted to collect rent. And we just leveled with him and said, you know, it's not going to happen, that we can't, and all likelihood is we were going to be filing bankruptcy." *See id.*, at 107:7-11.

18. Matt Smith then remembered in his deposition that he also remembers telling Scott Williams in that conversation that the Children's Center was going to vacate the property. *See id.*, at 108:3-109:16.

19. Marc Weinpel described the alleged conversation: “We told Mr. Williams that we were unable to pay the amount of rent and cam charges and the like. It appeared we would be heading for possibly bankruptcy.” *See* Deposition of Marc Weinpel, at 44:19-22, attached as Exhibit G to the Suppl. Armstrong Affidavit.

20. The Children’s Center did not inform Defendants it was going to vacate the 1675 Curlew property or that it had entered into a lease at 1975 Martha Avenue in Idaho Falls. *See* Ex. C, at 104:8-11.

21. Based on his discussions with Matt Smith, Scott Williams believed the Children’s Center wanted to consolidate its business operations in Pocatello and Idaho Falls into the 1675 Curlew Drive property. *See* Ex. F.

22. On February 7, 2008, the Children’s Center, Inc. re-affirmed and passed a corporate resolution it entered into on December 20, 2007. The December 20, 2007 corporate resolution related to the Children’s Center, Inc. “entering into a management contract with Advanced Practice Management, Inc., as passed at the December 20, 2007, [corporate] meeting.” *See* Ex. C, at 133:21-134:6.

23. According to the Children’s Center, Inc., Advanced Practice Management, Inc. was a management company the Children’s Center had hired to manage the business affairs of the Children’s Center, including managing the staff, the payroll, legal, and other “business affairs type operations.” *See id.*, at 134:7-15.

24. According to Mr. Smith, Advanced Practice Management, Inc. was to be housed at the 1675 Curlew Drive property with the Children’s Center. *See id.*, at 135:2-20.

25. The creation and operation of Advanced Practice Management, Inc., and the contract it entered into with the Children’s Center, Inc. on December 20, 2007 by way of the

Children's Center's corporate resolution, was part of the Children's Center's plan "to lessen the overhead burden on The Children's Center." *See id.*, at 136:11-16.

26. The plaintiff investors did not justifiably rely on any alleged misrepresentations of Defendants. *See* Affidavit of E. Robert Miller, attached as Exhibit II to Suppl. Armstrong Affidavit.

27. Mr. Miller has worked extensively in the commercial real estate industry, and is therefore familiar with industry standards relating to estoppel certificates, their purpose, and whether such certificates are typically relied on by buyers of commercial real estate for the purpose of supplanting, superceding, or replacing independent review and analysis of real estate and tenants occupying the real estate. *See id.*

20. Based on his experience, Mr. Miller is also familiar with the industry standard for conducting due diligence in relation to purchasing commercial real estate. *See id.*

21. According to Mr. Miller, it is standard in the industry for a purchaser of commercial real property to conduct a thorough investigation of its purchase prior to closing on that purchase. *See id.*

22. Such thorough investigation includes a visual inspection of the property, as well as a building inspection by an appropriate engineer or other professional. *See id.*

23. If the commercial property is occupied by a pre-existing commercial tenant, an appropriate and thorough investigation also requires the purchaser to meet and talk with the tenant, to meet and talk with the owner, to evaluate all relevant financial information relating to the tenant, including but not limited to the tenant's balance sheet, an appropriate credit report on the tenant, all judgments and bankruptcies pertaining to the tenant, income and expense

statements, aged receivables reports, appraisals, tax returns, profit and loss statements, and other relevant financial information. *See id.*

24. Mr. Miller has reviewed the depositions of Jeff Needs and Thomas O'Shea. He has read in those depositions that the only financial information Messrs. Needs and O'Shea reviewed in relation to the tenant was limited to 2005 and 2006 federal income tax returns of the tenant, and the tenant's partial profit and loss statement from January 2007 to June 2007. *See id.*

25. Some of the plaintiff investors only reviewed two pages from each of the 2005 and 2006 federal income tax returns and the partial profit and loss statement, while other plaintiff investors did not review any financial information related to the tenant and did not ask to review financial information related to the tenant. *See id.*

26. Mr. Miller also understands from his review of the depositions of Messrs. Needs and O'Shea that none of the plaintiff investors met or talked with the tenant prior to closing, despite Mr. O'Shea testifying in his deposition that he felt it was important for him to meet and talk with the tenant prior to closing in order to discuss the tenant's business plan and other aspects of the tenant's business. *See id.*

27. Based on these facts, it is Mr. Miller's opinion that the plaintiff investors failed to conduct a thorough investigation of their purchase of the 1675 Curlew property, and therefore could not have justifiably relied on any alleged misrepresentations of the seller. *See id.*

28. The plaintiff investors in this case did not and could not have justifiably relied on any alleged misrepresentations because they did not conduct the due diligence that was required of them under paragraph 9 of the real estate purchase contract, or as required of the

plaintiff investors by way of industry standards governing their performance of due diligence.
See id.

29. It is also Mr. Miller's opinion that it is not standard in the industry for California purchasers of commercial real estate to rely on an estoppel certificate to the extent claimed by the plaintiff investors in this case. *See id.*

30. Messrs. Needs and O'Shea both testified in their depositions they felt the limited financial information they reviewed in relation to the tenant was adequate due diligence on their part in light of representations made in the October 17, 2007 estoppel certificate, which was signed by the tenant. *See id.*

31. It was unreasonable for the plaintiff investors to rely heavily or primarily on *any* estoppel certificate as an excuse to not meet with the tenant or the owner prior to closing, or to conduct the other aspects of their due diligence that were required of them under paragraph 9 of the real estate purchase contract and industry standard. In my opinion, the plaintiff investors were unjustified in relying on the estoppel certificate to the extent they did. *See id.*

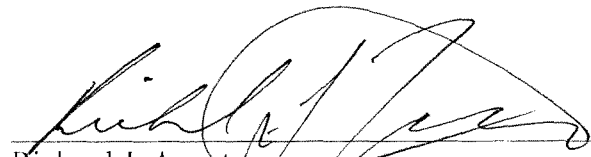
32. In the commercial real estate industry, an estoppel certificate generally serves the limited purpose of making the buyer aware that a tenant occupies the premises, and that a lease agreement has been signed. It is *not* standard in the industry for a buyer of commercial real estate to rely on an estoppel certificate for the purpose of determining the solvency or credit worthiness of a tenant, especially when the investment is \$3.7 million, involves an existing commercial tenant that has only occupied the property for less than 18 months prior to the purchase, and the term under the existing lease agreement is ten years. *See id.*

33. In such a situation, it is imperative on the part of the purchaser to conduct a thorough investigation into the tenant to determine its credit worthiness and its current and long term financial health. *See id.*

34. It is Mr. Miller's opinion that none of the plaintiff investors or their representatives conducted any such thorough investigation into the tenant. Therefore, none of the plaintiff investors justifiably relied on any alleged misrepresentations of the seller or its agents. *See id.*

RESPECTFULLY SUBMITTED this 14th day of December, 2009.

WOOD CRAPO LLC



Richard J. Armstrong
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of December, 2009, a true and correct copy of the foregoing ***STATEMENT OF FACTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT*** was served by email and U.S. mail, postage prepaid, to the following:

HOPKINS RODEN CROCKETT HANSEN & HOOPES, PLLC
Gregory L. Crockett
Sean J. Coletti
428 Park Avenue
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Idaho Falls, Idaho 83405-1219
seancoletti@hopkinsroden.com
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Marc J. Weinpel
1975 Martha Avenue
Idaho Falls, Idaho 83404
mweinpel@familytc.us

A handwritten signature in black ink, appearing to read "Mark O'Shea", is written over a horizontal line.

S:\01\DATA\LEADING HIGH MARK\O'SHEA STATEMENT OF FACT OPPOSING PLAINTIFFS' MOTION FOR PART SUMMARY JUDGMENT.wpd

WOOD CRAPO LLC
Richard J. Armstrong, ISBN 5548
500 Eagle Gate Tower
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BONNEVILLE COUNTY
IDAHO

2009 DEC 16 AM 10:35

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC, and JOHN DOES I-X,

Defendants.

***SUPPLEMENTAL AFFIDAVIT
OF RICHARD J. ARMSTRONG***

Case No. CV-08-4025

Judge Joel Tingey

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN D. ARAVE,
individually and as Member of High Mark
Development, LLC,

Third-Party Plaintiffs,

v.

THE CHILDREN’S CENTER, INC., an Idaho
corporation; THE IDAHO CHILDREN’S
CENTER, INC., an Idaho corporation,

Third-Party Defendants.

STATE OF UTAH

COUNTY OF SALT LAKE

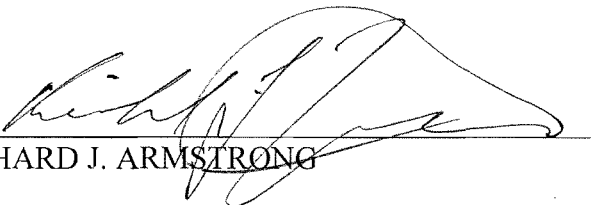
)
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RICHARD J. ARMSTRONG, being first duly sworn, deposes and says:

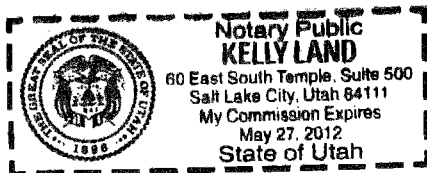
1. I am over the age of 18 years old and am competent to testify to the matters stated herein.
2. I am an attorney for Defendants High Mark Development, LLC, Gordon Arave, Jared Arave, and Benjamin Arave in the above captioned case.
3. Attached and incorporated as Exhibit A hereto are true and correct portions of the deposition of Gordon Arave.
4. Attached and incorporated as Exhibit B hereto is a true and correct copy of *Defendants’ Objections and Responses to Plaintiffs’ First Discovery Requests.*

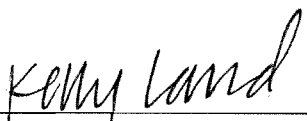
5. Attached and incorporated as Exhibit C hereto are true and correct portions of the deposition of Matt Smith.
6. Attached and incorporated as Exhibit D hereto is a true and correct copy of the Children's Center's history of payments.
7. Attached and incorporated as Exhibit E hereto is a true and correct copy of a fax from Jeff Needs to Paul Fife dated September 6, 2007.
8. Attached and incorporated as Exhibit F hereto is the *Affidavit of Scott Williams*.
9. Attached and incorporated as Exhibit G hereto are true and correct portions of the deposition of Marc Weinpel.
10. Attached and incorporated as Exhibit H hereto is a true and correct copy of the *Affidavit of E. Robert Miller*.

DATED this 14th day of December, 2009.


RICHARD J. ARMSTRONG

SUBSCRIBED AND SWORN to before me this 14th day of December, 2009.




NOTARY PUBLIC

A

1113

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE)
O'SHEA, Trustees of the Thomas and)
Anne O'Shea Trust u/d/t DATED)
NOVEMBER 2, 1998; GRANDVIEW CREDIT,) Case No.
LLC, a California limited liability) CV-08-4025
company; CALEB FOOTE, an individual,)
KATE LARKIN DONAHUE, an individual,)
JOHN KEVIN DONAHUE, an individual,)
and SAN FRANCISCO RESIDENCE CLUB,)
INC., a California corporation;)

Plaintiffs,)

vs.)

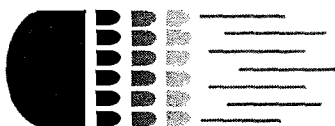
HIGH MARK DEVELOPMENT, LLC, an Idaho)
limited liability company; GORDON)
ARAVE, individually and as Member of)
High Mark Development, LLC; JARED)
ARAVE, individually and as Member of)
High Mark Development, LLC; BENJAMIN)
ARAVE, individually and as Member of)
High Mark Development, LLC; and JOHN)
DOES I-X,)

Defendants.)

DEPOSITION OF GORDON ARAVE

Thursday, January 29, 2009, 1:15 p.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

COPY

REPORTED BY:
Sandra D. Terrill,
RPR, CSR

PREPARED FOR:
MR. ARMSTRONG

1114

POST OFFICE BOX 51020
IDAHO FALLS, IDAHO 83405

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

SHEET 4 PAGE 13

1 building, yes.
 2 **Q. Okay. There's currently a suit --**
 3 **there's a suit pending in Bannock County, Crestwood**
 4 **Enterprises versus The Children's Center,**
 5 **Incorporated. Are you familiar with that --**
 6 A. I certainly am.
 7 **Q. -- on a breach of lease?**
 8 A. I am.
 9 **Q. And what building is that?**
 10 A. That building is located at 1151
 11 Hospital Way in Pocatello. It is owned by
 12 Crestwood Enterprises, LLC.
 13 **Q. And are you a principal or an owner**
 14 **of --**
 15 A. I stated earlier that I own 37 and a
 16 half percent of that entity.
 17 **Q. Okay. And that suit is against The**
 18 **Children's Center and The Idaho Children's Center**
 19 **over a breach of lease?**
 20 A. That's correct.
 21 **Q. Are you a party to or involved at all**
 22 **in any way as an owner or principal in a suit**
 23 **pending in Bonneville County, Pepperwood Plaza**
 24 **Enterprises versus M. Smith Enterprises and Matt**
 25 **Smith?**

PAGE 14

1 A. I am not.
 2 **Q. And that would be Mr. Stallings?**
 3 A. I believe so.
 4 **Q. And is that the building you make**
 5 **reference to the fact that you built?**
 6 A. That's the building, I believe. I'm
 7 not familiar exactly with Pepperwood Plaza, if
 8 that's the correct name, but I --
 9 **Q. You built the building at 1619 Curlew**
 10 **Drive?**
 11 A. I did.
 12 **Q. When I say "you," Arave Construction?**
 13 A. I would have -- I can't remember
 14 whether it was Arave Construction or High Mark
 15 Development that built the building.
 16 **Q. I see.**
 17 A. But I was involved, yes.
 18 **Q. And apparently early on you or an**
 19 **entity in which you were involved did lease that**
 20 **building at 1619 Curlew to Matt Smith Enterprises?**
 21 A. That is correct.
 22 **Q. And as far as your dealing, do you**
 23 **have any claims or causes of action against either**
 24 **Matt Smith Enterprises and/or Matt Smith related to**
 25 **your lease of that building?**

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1 MR. ARMSTRONG: Objection, calls for a
 2 legal conclusion.
 3 THE WITNESS: No.
 4 (Interruption by a cell phone.)
 5 MR. ARMSTRONG: I'm not sure if he answered
 6 that question.
 7 THE WITNESS: Go ahead.
 8 **Q. BY MR. CROCKETT: Well, the question**
 9 **was, I think, did you or any entity in which you**
 10 **were involved have any claims or cause of action**
 11 **against M. Smith Enterprises, LLC, or Matthew Smith**
 12 **for the lease and rental of the building at 1619**
 13 **Curlew, Idaho Falls?**
 14 MR. ARMSTRONG: Same objection, calls for a
 15 legal conclusion.
 16 **Q. BY MR. CROCKETT: Can you answer it?**
 17 A. No.
 18 MR. ARMSTRONG: I'm sorry. Just so we're
 19 clear, no, you can't answer it or what's the answer
 20 to the question? I just want to make sure I'm
 21 clear.
 22 THE WITNESS: Well --
 23 MR. ARMSTRONG: Do you understand the
 24 question that was asked?
 25 THE WITNESS: Repeat the question one more

PAGE 16

1 time, please.
 2 **Q. BY MR. CROCKETT: Are you confused**
 3 **about the nature of the question or do you want to**
 4 **just explain your answer to me?**
 5 A. Well, that telephone rang during the
 6 time that you were talking so repeat the question
 7 one more time.
 8 **Q. My question is you've previously**
 9 **indicated that you or an enterprise in which you**
 10 **were involved in did at one time own and lease the**
 11 **building at 1619 Curlew, Idaho Falls, correct?**
 12 A. Uh-huh.
 13 **Q. That's a yes?**
 14 A. Yes.
 15 **Q. Okay. And my question is then you**
 16 **apparently -- the property was leased to M. Smith**
 17 **Enterprises, LLC, correct?**
 18 A. That is correct.
 19 **Q. By whom?**
 20 A. That I can't recall, whether it would
 21 have been Crestwood Enterprises or High Mark
 22 Development. It was probably one of the two. I
 23 honestly can't remember which. Both -- I was
 24 involved, however.
 25 **Q. And then the final question, do you**

1 have any claims or causes of action against
 2 M. Smith Enterprises related to that lease?
 3 A. Not that I'm aware of.
 4 Q. Well, would there be any that you're
 5 not aware of?
 6 A. I don't believe so.
 7 Q. Who, if you're not aware of them,
 8 would be aware of them?
 9 A. I don't think there are any.
 10 Q. When did you first start dealing with
 11 Matthew F. Smith concerning properties? Let me
 12 just ask you: It would appear that at one time you
 13 were involved in an initial lease, and you said
 14 this in your answers to interrogatories to us, that
 15 you had a property at 1612 Curlew that you leased
 16 to M. Smith Enterprises or Matthew Smith. Do you
 17 recall that?
 18 MR. ARMSTRONG: Objection. Compound. I
 19 think there were two questions there. Assumes
 20 facts.
 21 THE WITNESS: I don't have any -- the only
 22 property that I'm aware of is 1619 Curlew. I'm not
 23 aware of 1612. There may have been designated
 24 suites in that building, but 1619 is the only
 25 address that I'm familiar with.

1 Q. BY MR. CROCKETT: Okay. And if I
 2 represent to you that there's a separate building
 3 at 1612, do you remember that?
 4 A. No.
 5 Q. I'm going to quote you from
 6 interrogatories. Do you remember answering
 7 interrogatories for me and signing those?
 8 A. I do.
 9 MR. ARMSTRONG: You need to let him finish
 10 his question so the record can pick up.
 11 Q. BY MR. CROCKETT: Let me just show you
 12 the verification page dated September 30th. Is
 13 that your signature?
 14 A. That's my signature.
 15 Q. And do you recognize these as the
 16 answers to interrogatories you provided?
 17 A. I'll assume that --
 18 MR. ARMSTRONG: If he can have a copy of
 19 them so he can look at them. You're showing him
 20 the first page and then the signature page. He
 21 hasn't had a chance to look at the whole document.
 22 Q. BY MR. CROCKETT: You need to look at
 23 them and take whatever time you need to identify
 24 that those are the interrogatories you reviewed and
 25 signed.

1 A. They look correct to me.
 2 Q. Okay. Can you hand them back to me.
 3 This is your response to interrogatory No. 7, and
 4 I'm quoting from page 7, you just say -- first of
 5 all, when you talk about The Children's Center that
 6 you refer to the fact that it will hereafter be
 7 referred to as The Center. Then you say in 2002
 8 The Center first began renting property from
 9 entities related to defendant, High Mark, located
 10 at 1615 Curlew. Is that correct?
 11 A. I can't remember the date, but that's
 12 approximately when, in my mind.
 13 Q. Is there a building at 1615 Curlew?
 14 A. The only building that I'm aware of is
 15 1619 unless there's -- unless I'm confusing the
 16 address. There's one building sitting back there
 17 and I recall that address to be 1619 Curlew Avenue.
 18 Q. When you say "first began renting
 19 properties from entities related to the defendant,
 20 High Mark Development," do you know who that would
 21 be?
 22 A. I don't remember the names. I don't
 23 remember how we structured that. I had others
 24 working for me that were handling those leases. I
 25 just don't remember how that was set up initially.

1 Q. Who would have handled the leases?
 2 A. I had a young man by the name of Ryan
 3 Alexander, who was involved in real estate at the
 4 time or he was associated with us. Might have been
 5 him or Ben.
 6 Q. Or Ben?
 7 A. Ben Arave. One of those two may have
 8 initiated that at that date. I don't recall,
 9 honestly.
 10 Q. What do you recall about your history
 11 of dealings either with High Mark or other
 12 enterprises you may have been involved with at
 13 various times? What do you recall about the
 14 history of your dealings with Mr. Smith or his
 15 companies known as M. Smith Enterprises and/or The
 16 Children's Center, Inc.?
 17 A. We had a very cordial relationship.
 18 He paid his rent promptly. He was very good to
 19 work with. I had what I would consider a pleasant
 20 relationship with him.
 21 Q. I see. And do you recall the
 22 circumstances -- he was apparently a tenant at 1619
 23 Curlew, correct?
 24 A. I believe that's correct. He was a
 25 tenant in that building in the corner. If 1619 is

1 correct, and I believe it is, he was a tenant in
2 that building. That's where I met him initially.
3 **Q. And then tell me how he got to be the**
4 **tenant at 1675 Curlew, the same property you sold**
5 **to Mr. O'Shea?**
6 A. He approached us, probably either
7 myself or Ben, about -- we owned property -- High
8 Mark Development owned the lot adjacent to that.
9 He approached us after a few years. He had in the
10 meantime occupied space or rented from us in
11 Pocatello, and following that asked if we would
12 consider constructing something new for him on the
13 lot next to 1619, which is now 1675 Curlew.
14 **Q. And did you do that?**
15 A. We did do that.
16 **Q. The history of that would show that**
17 **that property was originally deeded to Arave**
18 **Construction, Incorporated, and Arave Brothers,**
19 **Incorporated. Do you recall that?**
20 MR. ARMSTRONG: Objection. Foundation.
21 Assumes facts. You can answer the question.
22 **Q. BY MR. CROCKETT: I'm just asking if**
23 **you know.**
24 A. I know the names of those companies.
25 I don't remember the details as to who owned what

1 when. I just don't. Various people are involved
2 in how that works.
3 **Q. All right. But you did say you were a**
4 **principal in Arave Construction, Incorporated?**
5 A. Yes.
6 **Q. And is that your company down at**
7 **Blackfoot at the address in which you've given us**
8 **at the start of your deposition?**
9 A. That is.
10 **Q. Is it fair to say that's your**
11 **principal business, Mr. Arave?**
12 A. I think that would be fair to say,
13 yes.
14 **Q. Now, tell me what Arave Brothers,**
15 **Incorporated, is.**
16 A. I did forget about Arave Brothers when
17 you asked earlier. It's simply a company that my
18 brother and I, Tom Arave, have -- oh, it's a
19 company that we bought property in over the years.
20 **Q. Your brother, what's his name?**
21 A. Tom Arave.
22 **Q. And where does he live?**
23 A. He lives in Blackfoot as well.
24 **Q. Is he involved in Arave Construction?**
25 A. He is.

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1 **Q. Okay. Is he a principal in Arave**
2 **Construction?**
3 A. He's -- yes. He's the vice president
4 of Arave Construction Company.
5 **Q. Who's the president?**
6 A. I am.
7 **Q. So who built the building at 1675**
8 **Curlew?**
9 A. My recollection is that that building
10 was -- the owner was High Mark Development and they
11 hired Arave Construction Company as the -- because
12 Arave Construction Company is the building
13 contracting end of -- is the licensed contractor in
14 the State of Idaho, that Arave Construction Company
15 then built that building in behalf of High Mark
16 Development.
17 **Q. Okay. And do you remember when you**
18 **completed it?**
19 A. I'm going to guess early summer, late
20 spring 2006. I'm guessing slightly. In that
21 vicinity.
22 **Q. Do you know when The Children's Center**
23 **moved in?**
24 A. Soon thereafter.
25 (Exhibit *-001 marked.)

1 **Q. BY MR. CROCKETT: I'm going to show**
2 **you Deposition Exhibit No. *-001. And do you know**
3 **what -- can you identify it for me?**
4 MR. ARMSTRONG: Do you have a copy for me?
5 MR. CROCKETT: I don't. I didn't really
6 anticipate that. I'll make copies later. I've got
7 copies of everything else. I didn't make a copy of
8 that. He doesn't, apparently, recall the dates so
9 I'm just trying to refresh his recollection.
10 THE WITNESS: What is the date? Where does
11 it talk about the date? That's what I was
12 guessing, wasn't it?
13 **Q. BY MR. CROCKETT: Did you sign the**
14 **documents, Mr. Arave?**
15 A. Yes. That's my signature.
16 **Q. On behalf of High Mark Development?**
17 A. It looks like I did.
18 **Q. Is that your lease to The Children's**
19 **Center, Incorporated?**
20 A. I believe that is.
21 **Q. Is that the one and only lease you**
22 **ever had with The Children's Center, Incorporated,**
23 **for that property?**
24 A. I think so. I don't --
25 **Q. What does it indicate the commencement**

1 Q. BY MR. CROCKETT: I'm sorry. 1675.
 2 A. 1675.
 3 Q. The record will indicate that the
 4 subject property is at 1675 Curlew.
 5 A. That's what I would think this is,
 6 yes.
 7 Q. And do you also agree that the other
 8 entry for Crestwood Enterprises would have had
 9 specifically to do with the professional office
 10 building that you leased to The Children's Center
 11 in Pocatello?
 12 A. I believe so, yes.
 13 Q. It wouldn't relate to any other
 14 property, would it?
 15 A. No. I have none other down there.
 16 (Exhibit *-010 marked.)
 17 Q. BY MR. CROCKETT: Handing you what's
 18 been marked as Deposition Exhibit No. *-010. Do
 19 you recognize the document?
 20 A. Can't say as I do, but --
 21 Q. It comes from your office though,
 22 doesn't it, don't you agree?
 23 MR. ARMSTRONG: Objection, foundation.
 24 Q. BY MR. CROCKETT: Doesn't the top of
 25 the fax indicate that it was faxed --

1 Calls for speculation.
 2 THE WITNESS: I don't know where that came
 3 from.
 4 MR. ARMSTRONG: Can you answer his
 5 question?
 6 THE WITNESS: I can't. I don't know.
 7 Q. BY MR. CROCKETT: Can you do the math?
 8 A. Well, I could if you have a
 9 calculator. Give me a calculator.
 10 MR. ARMSTRONG: It's not your obligation.
 11 Wait for the next question.
 12 Q. BY MR. CROCKETT: You would recognize
 13 that that would purport to represent that over a
 14 13 month period of time that the rent was 324,836?
 15 A. It says 13 months and, obviously, rent
 16 was given to The Children's Center -- or excuse
 17 me -- to High Mark to make the mortgage payments
 18 with. We've discussed the -- we've discussed the
 19 restructuring and the note payments and so on, but
 20 the money still had to come in to High Mark to make
 21 those payments with.
 22 Q. Okay. Thank you.
 23 (Exhibit *-011 marked.)
 24 Q. BY MR. CROCKETT: Showing you what's
 25 been marked Exhibit No. *-011. Do you recognize

1 A. It says that it was faxed from my
 2 office.
 3 Q. Okay. You don't know who prepared it?
 4 A. I don't remember the document but what
 5 is it? Let's see. I'm not familiar with this, but
 6 I can't say anything more. It looks like it was
 7 faxed from Arave Construction -- from the Arave
 8 Construction office, yes.
 9 Q. You just don't know who prepared it?
 10 A. I do not.
 11 Q. I'll represent to you that it went to
 12 your real estate agent, Paul Fife, and he provided
 13 this. Do you know to the contrary?
 14 A. No, I don't know. That could be true.
 15 It probably is true.
 16 Q. And do you recognize the first line
 17 says, rent received, 6-26 through 7-27-07 -- I'm
 18 sorry -- 6-2006 through 7-2007 of \$324,836?
 19 A. That's what it says.
 20 Q. If that relates to the rent from The
 21 Children's Center to High Mark Development, do you
 22 agree with me it would have to also -- that number
 23 would also have to include the rent represented by
 24 the deferral note?
 25 MR. ARMSTRONG: Objection. Foundation. 1119

1 the document?
 2 A. Again, I do not. It's something that
 3 looks to me that Scott prepared.
 4 Q. I know it looks like it was faxed,
 5 again, from Arave Construction; do you agree?
 6 A. It is.
 7 Q. Signed by Scott Williams?
 8 A. It looks like it is.
 9 Q. Do you recognize his signature?
 10 A. That looks like his signature, yes.
 11 Q. And do you agree with me that it
 12 appears to be a demand -- simply a Dunner letter or
 13 a collection letter sent to The Children's Center?
 14 MR. ARMSTRONG: Objection. Calls for a
 15 legal conclusion. Foundation. Calls for
 16 speculation.
 17 THE WITNESS: I don't know. Obviously, you
 18 can read the words. October the 8th, so I don't
 19 know what day or what this represents, but Scott
 20 was in charge of collecting the rent and making the
 21 payments, so the letter speaks for itself.
 22 MR. CROCKETT: Okay. Thank you.
 23 (Exhibit *-012 marked.)
 24 Q. BY MR. CROCKETT: Showing you what's
 25 been marked as Deposition Exhibit No. *-012. Would

B

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WOOD CRAPO LLC
Richard J. Armstrong, ISBN 5548
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
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Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
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FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
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Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Officer of High
Mark Development, LLC; BENJAMIN D.
ARAVE, individually and as Officer of High
Mark Development,

Defendants.

***DEFENDANTS' OBJECTIONS
AND RESPONSES TO
PLAINTIFFS' FIRST SET OF
INTERROGATORIES, REQUESTS
FOR PRODUCTION, AND
REQUESTS FOR ADMISSION***

Case No. CV-08-4025

Judge Joel E. Tingey

Defendants High Mark Development, LLC, Gordon Arave, and Benjamin D. Arave, (“Defendants”) hereby respond to Plaintiffs’ First Set of Interrogatories, Requests for Production, and Requests for Admission (“Discovery Requests”) as follows:

GENERAL OBJECTIONS

GENERAL OBJECTION NO. 1: Defendants object to each and every interrogatory (“Interrogatories”), request for production of documents and things (“Request”), and Requests for Admission (“RFA”) contained in the Discovery Requests, to the extent that and insofar as they seek to impose requirements or obligations beyond those imposed by the *Idaho Rules of Civil Procedure*.

GENERAL OBJECTION NO. 2: Defendants object to each and every Interrogatory, Request, and RFA to the extent the requesting parties request information or documents protected by the lawyer-client privilege, information protected by the work product doctrine or trial preparation materials protected under Rule 502 of the *Idaho Rules of Evidence* and Rule 26(b)(3) of the *Idaho Rules of Civil Procedure* or under any other valid privilege.

GENERAL OBJECTION NO. 3: Defendants object to the Interrogatories, Requests, and RFAs insofar as they seek documents and information and/or production of documents not available to Defendants at this time and/or documents and information in Plaintiffs’ possession. Accordingly, the responses given herein are based on the information and documents currently available to Defendants, subject to any applicable objections. By stating

INTERROGATORY NO. 4: Identify by name, address and telephone number each and every person or firm not previously identified in your answers to the foregoing interrogatories who possesses or claims to possess knowledge of any facts relating to this lawsuit, including, but not limited to, issues of liability and/or damages.

RESPONSE: Defendants anticipate the following individuals to have knowledge or information relating to the claims and defenses in this matter:

1. Plaintiffs, c/o Gregory Crockett, Hopkins Roden Crockett Hansen & Hoopes, PLLC, 428 Park Avenue, P.O. Box 51219, Idaho Falls, Idaho 83405-1219.
2. Defendants High Mark Development, LLC and Gordon Arave, c/o Richard J. Armstrong, Wood Crapo LLC, 500 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111.
3. Jerald Oakley, c/o Richard J. Armstrong, Wood Crapo LLC, 500 Eagle Gate Tower, 60 East South Temple, Salt Lake City, Utah 84111.
4. The Children's Center, Inc., c/o Marc J. Weinpel, Esq., 1975 Martha Avenue, Idaho Falls, Idaho 83404, (208) 529-4300 x115.
5. Jeff Needs, 1306 2nd Street S, Nampa, Idaho 83651.
6. Paul Fife, High Desert Realtors, Idaho Falls, Idaho 83401-5285.

INTERROGATORY NO. 5: Please describe with particularity each and every item you intend to offer into evidence at the trial of this matter. As to each such item, please state:

(a) The name, address and telephone number of the person having present custody of each such item;

(b) The name, address and telephone number of the witness whom Defendant will use to introduce each item; and

(c) The contents of the item, or if Defendant will do so without a formal request, please attach a copy of each item to your answers to these interrogatories.

OBJECTION AND RESPONSE: Defendants object to this interrogatory as it calls for information that is not required to be disclosed at this time of the litigation. Moreover, Defendants have not decided which exhibits to mark and offer as trial exhibits for purposes of a trial in this case. Subject to and without waiving these objections, Defendants anticipate offering as an exhibit the Real Estate Purchase Contract entered into by the parties; any and all documents obtained through the discovery process in this matter, including any and all documents subpoenaed from third-party witnesses; and any documents identified and offered as an exhibit by Plaintiffs. Defendants will identify their trial exhibits at the appropriate time and intervals, consistent with the Court's scheduling and case management order and Idaho R. Civ. P. 26(e).

INTERROGATORY NO. 6: Are you or your attorneys aware of any statements, reports of memoranda, signed or unsigned, made by any person relating to the subject of this action? If so, please state:

(a) Whether such statement is written or oral;

(b) The names, addresses and telephone numbers of any persons making such

statements;

- (c) The date, time and place of the making of such statements; and
- (d) The names, addresses and telephone numbers of any persons present

during the taking of such statements.

OBJECTION AND RESPONSE: Defendants object to this interrogatory as being vague and ambiguous as to the terms “statements” and “reports of memoranda.” Subject to and without waiving this objection, Defendants are not aware at this time of any such documents. Discovery is still ongoing in this case. Defendants therefore reserve the right to supplement this response at the appropriate time or intervals if necessary, and consistent with Idaho R. Civ. P. 26(e).

INTERROGATORY NO. 7: Please describe in detail The Children's Center, Inc. and/or M. Smith Enterprises, LLC's entire rent payment history, including any and all nonpayment of rent, promissory notes entered in lieu of payment of rent, or any other agreements between Defendants and The Children's Center and/or M. Smith Enterprises, LLC, regarding the payment of rent, on the building at 1619 Curlew Drive, Ammon, Idaho 83406.

OBJECTION AND RESPONSE: Defendants object to this interrogatory on grounds of being vague and ambiguous, calls for a narrative, lacks foundation, and calls for a legal conclusion that Defendants are not qualified to make. Subject to and without waiving these objections, Matthew Smith is a shareholder and officer of the Children's Center, Inc. (hereinafter the “Center”). In 2002, the Center first began renting property from entities related to Defendant High Mark Development, LLC located at 1615 Curlew Drive, Ammon, Idaho. The Center paid rent every month on time and in full during the life of the lease.

In 2004, the Center approached Defendant Gordon Arave and proposed the idea of having Defendants build him a new facility in Pocatello, Idaho, and leasing it back to the Center so that the Center could expand its business into the Pocatello region. After some negotiation, Defendant Gordon Arave and the Center moved forward on the project.

In May 2005, the project was completed and the Center began to occupy the Pocatello building. Due to the fact that the area was new to the Center, it negotiated a six-month period of reprieve from rent so that it could start its business operations before being required to pay rent.

In September 2005, the Center, through Matthew Smith, came to Defendant Gordon Arave and asked him to loan the Center \$200,000.00 in order to recruit two new psychiatrists to the Center in order to grow its business. Defendant Gordon Arave and related entities, including the owner of the Pocatello building, Crestwood Enterprises, LLC, had an established business relationship with the Center and therefore the decision was made to loan the Center and/or Mr. Smith the requested funds. The notes were to be paid interest only at 10 % with 5 year balloon payments.

In August 2005, the Center, through Matt Smith, asked Defendant Gordon Arave to build the Center a new facility in Ammon, Idaho to accommodate the Center's growing business in the Bonneville County region. Because Defendant owned the lot next to the building occupied at that time by the Center, Defendants agreed to do so.

In October 2005, a related entity, Arave Construction Co., Inc., began designing and constructing the Ammon building. Because the Center's business was established, the

parties agreed that rental payments for the Ammon building would not begin until completion of the building, which, at that time, was scheduled to occur in July 2006.

The Ammon building was completed and the Center moved into the building by late July 2006. Rent payments and other applicable lease charges began on schedule. Soon thereafter, the Center, through Matt Smith, contacted the owner and landlord of the building, Defendant High Mark Development, LLC, and requested that High Mark Development change the terms of the lease agreement as they applied to rent payments. The Center explained that the costs associated with the start-up of the new building and business put a squeeze on the Center's cash flow, and therefore the Center needed a six-month period of reprieve from rent payments, similar to that agreed to in connection with the Pocatello building. Defendant High Mark Development did not agree to this request, and instead agreed to spread the first 6 months of rent over 7 years thus allowing the Center some breathing room for making its rent payments.

Payments began in early 2007 on both the note and the rent. All payments were made as agreed through September 2007.

In June 2007, the Ammon building was listed for sale. A sale was procured that summer and a closing set for November 2007. In negotiations between the buyer and seller, the O'Shea Family Trust, through its agent, Jeff Needs, stated that it would not agree to purchase the building if the option to purchase remained in the Center's lease agreement. The buyer indicated, again through its agent Jeff Needs, that in order for it to agree to purchase the building, the purchase option had to either be released and surrendered by the Center, and that if the option was not released, the buyer and seller would have to indemnify around the purchase option by

requiring High Mark's principal, Gordon Arave, to sign an indemnification against the Center's exercise of the purchase option. Instead of indemnifying around the option, High Mark was able to negotiate a release of the option to purchase, consistent with the buyer's demands. Indeed, the option was purchased and released by High Mark in exchange for, among other things, a new promissory note relating to the October and November 2007 rent payments. Such consideration was required in order to satisfy the buyer's request to either surrender and release the option to purchase or otherwise indemnify around it.

On approximately February 4, 2008, Crestwood Enterprises, LLC, served the Center with a *3-Day Notice to Pay Rent or to Quit Premises* in relation to the building located in Pocatello, Idaho. The Center did not comply with the notice, therefore Crestwood Enterprises filed an eviction action against the Center. The Center eventually vacated the Pocatello building. Crestwood then filed a separate but related action seeking legal damages against the Center for breaching its lease agreement in the Pocatello building.

INTERROGATORY NO. 8: Please describe in detail The Children's Center, Inc.'s entire rent payment history, including any and all nonpayment of rent, promissory notes entered into in lieu of payment of rent, or any other agreements between Defendants and The Children's Center regarding the payment of rent, on the building at 1675 Curlew Drive, Ammon, Idaho 83406.

RESPONSE: See Objection and Response to Interrogatory No. 7.

INTERROGATORY NO. 9: Please describe in detail The Children's Center, Inc.'s entire rent payment history, including any and all nonpayment of rent, promissory notes

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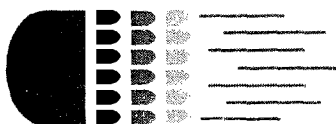
IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE)
O'SHEA, Trustees of the Thomas and)
Anne O'Shea Trust u/d/t DATED) Case No.
NOVEMBER 2, 1998; GRANDVIEW CREDIT,) CV-08-4025
LLC, a California limited liability)
company; CALEB FOOTE, an individual,)
KATE LARKIN DONAHUE, an individual,)
JOHN KEVIN DONAHUE, an individual,)
and SAN FRANCISCO RESIDENCE CLUB,)
INC., a California corporation;)
Plaintiffs,)
vs.)
HIGH MARK DEVELOPMENT, LLC, an Idaho)
limited liability company; GORDON)
ARAVE, individually and as Member of)
High Mark Development, LLC; JARED)
ARAVE, individually and as Member of)
High Mark Development, LLC; BENJAMIN)
ARAVE, individually and as Member of)
High Mark Development, LLC; and JOHN)
DOES I-X,)
Defendants.)

DEPOSITION OF MATTHEW F. SMITH

Tuesday, February 17, 2009, 1:00 p.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

COPY

REPORTED BY:

Sandra D. Terrill,
RPR, CSR

PREPARED FOR:

1132 MR. ARMSTRONG

POST OFFICE BOX 51020
IDAHO FALLS, IDAHO 83405

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

1 through September 17th, '07 -- would that be what's
2 represented there?

3 A. That appears to be.

4 Q. I think we've identified the fact that
5 you started commencement of your tenancy at 1675
6 Curlew in June of '06. Then may we presume that
7 those checks or those payments were made for rent
8 for those premises?

9 MR. ARMSTRONG: Objection, foundation.

10 Q. BY MR. CROCKETT: As far as you know.

11 A. Yeah.

12 MR. CROCKETT: And, Counsel, do you agree
13 with that, that that's what represented by the
14 record that's been produced?

15 MR. WEINPEL: That's my understanding. The
16 amount over and above the base rent, I believe,
17 would be cam charges is the best I can figure.

18 MR. CROCKETT: But are we all clear here
19 that we believe that this would have been the
20 totality of all rent payments The Children's
21 Center, Inc., or the Idaho Children's Center, Inc.,
22 would have paid to High Mark Development for rent
23 of the premises at 1675 Curlew?

24 MR. WEINPEL: That's my understanding of
25 what *-102 shows. That's all of the lease

1 Enterprises to Mr. Arave.

2 MR. CROCKETT: For what? Was it for rent
3 or something else?

4 MR. WEINPEL: The way I understand it --
5 and Mr. Smith can probably fill in the blanks. The
6 way I understand it, Mr. Arave lent M. Smith
7 Enterprises \$200,000. Mr. Smith took the \$200,000
8 and lent it to The Children's Center, and we
9 were -- The Children's Center was paying it back on
10 behalf of M. Smith Enterprises. That's my
11 understanding.

12 Q. BY MR. CROCKETT: Mr. Smith, do you
13 concur that's what *-103 is --

14 A. Yes.

15 Q. -- to the best of your knowledge?

16 A. That is.

17 Q. Now, tell me again. To your
18 understanding, would these be the same promissory
19 notes that we previously made? There was two
20 promissory notes, one in June of '05 and one in
21 October of '05 for a hundred thousand dollars each.
22 Are those the same ones?

23 A. Yeah.

24 MR. ARMSTRONG: Objection, foundation.
25 Calls for speculation.

1 payments.

2 MR. CROCKETT: Let me just ask you this:
3 Would the company have copies of these checks also
4 available, or do you know?

5 MR. WEINPEL: If we had actual copies -- we
6 would not have copies of the checks. We might have
7 copies of the stubs, but I could not find any of
8 the stubs.

9 Q. BY MR. CROCKETT: Do you know what
10 bank these checks would have been written on?

11 A. I believe it was through Key Bank.

12 Q. Key Bank.

13 A. Is that what that says on the --

14 MR. WEINPEL: Yeah. Those are Key Bank.

15 MR. CROCKETT: Counsel, I'm going to ask
16 you, apparently, you've now also provided Exhibit
17 No. *-103 in response to our subpoena. Can we
18 identify what that is and why it's responsive to
19 the subpoena?

20 MR. WEINPEL: Here's the way I understand
21 it. This is a -- at the top of the report it's
22 generated by The Children's Center. It referenced
23 M. Smith Enterprises. These are -- this was a
24 record created by, I believe, Tera Hansen that
25 tried to track what was being paid for M. Smith

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1 THE WITNESS: Yes. That's -- I mean, I'd
2 have to check the notes, but I think those are the
3 correct dates. You say June and what?

4 MR. WEINPEL: October.

5 THE WITNESS: Yeah.

6 Q. BY MR. CROCKETT: This would show,
7 apparently, a deposit to your Key Bank account on
8 July 1st, '05, of a hundred thousand. Do you agree
9 with that, line 1?

10 A. Yes.

11 Q. And then October 4th, a deposit to
12 your Key Bank account of 99,500?

13 A. Yes.

14 Q. Do you know what accounts for the \$500
15 difference there?

16 A. No. I don't have a clue.

17 MR. WEINPEL: I'd asked him that a number
18 of times.

19 Q. BY MR. CROCKETT: As I understand it
20 your testimony is and after some research by your
21 counsel, we believe that this would document both
22 receipt of and payments against the two promissory
23 notes dated June 1st, 2005, and October 1, 2005.
24 Would that be correct?

25 A. Yeah.

DEPOSITION OF MATTHEW F. SMITH - 02/17/09

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1 was just rent deferral. And I didn't recall that
2 this was split up into two different sections
3 but --
4 Q. Tell me how this rent deferral came
5 about. Let me just ask you this: The note is
6 dated April 18th, 2007. Would that have been when
7 all these terms were negotiated with Mr. Arave and
8 High Mark?
9 A. That was kind of a whirlwind time, but
10 I'm assuming that is -- I believe that's correct,
11 that that's when this was.
12 Q. Now, I understand that your landlord
13 or The Children's Center landlord would have been
14 High Mark, correct?
15 A. Yes.
16 Q. This is a note obligation in favor of
17 Jared Arave and Gordon Arave of Blackfoot, Idaho.
18 Do you see that?
19 A. Right.
20 Q. Do you know, why the difference there?
21 Can you explain that, if you know?
22 A. I really don't know why Jared Arave
23 and Gordon Arave were on there.
24 Q. Who's Jared Arave? Do you know Jared?
25 A. I've never met him. I believe it's

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1 his dad.
2 Q. You think it's Gordon's dad?
3 A. Yes.
4 Q. Well, I would represent to you it's
5 the other way around. Gordon is Jared's dad, but
6 you've never met Jared?
7 A. I really don't know. I mean, I just
8 got that impression.
9 Q. Now, going back to Exhibit *-101 --
10 I'm sorry. I'm sorry. I'm going back to Exhibit
11 *-102. And I think we've previously identified
12 that as rent payments from The Children's Center to
13 High Mark Development; would that be correct?
14 A. I believe that's the case, yes.
15 Q. Now, apparently, I would understand by
16 the note that The Children's Center didn't pay any
17 rent to High Mark for the months September '06
18 through January of '07; is that right?
19 A. Yeah. It looks that way and I believe
20 that was the case.
21 Q. And instead you executed this note for
22 rent deferral, correct?
23 A. Right.
24 Q. Okay. Did you pay this note off, the
25 note that's Exhibit --

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1 A. My legal counsel can probably explain
2 it better than I can, but we, in essence,
3 negotiated that note away.
4 Q. As I understand it, in approximately
5 September or October of 2007 you agreed to waive
6 the right of first refusal on the property at 1675
7 Curlew?
8 A. In exchange for that, yes. That's how
9 I recall it.
10 Q. And a part of that agreement was that
11 you would execute a lease estoppel certificate; is
12 that right?
13 A. What's a lease estoppel?
14 Q. Well, we'll get there. Did you
15 negotiate when you got into this lease -- when you
16 got into this lease in June of '06 -- and that's
17 Exhibit No. *-001, if you recall the lease -- did
18 you negotiate any of these up front, any of these
19 rent deferrals, or did they come along later?
20 A. The rent deferral that you're talking
21 about here?
22 Q. Yes.
23 A. That came across later.
24 Q. I would understand that during this
25 period, and I'm talking about the period of the

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1 rent deferral, September '06 through January '07,
2 that The Children's Center was just basically not
3 able to pay the rent; is that correct?
4 A. That's correct. Right.
5 Q. And during that period of time did you
6 inform Mr. Arave that you were simply not able to
7 pay the rent?
8 A. Yeah. He was involved pretty
9 intimately. He even had his accountant come in and
10 look at our books.
11 Q. Who was his accountant?
12 A. I don't recall his name.
13 Q. Did you ever deal with Scott Williams?
14 A. Williams?
15 Q. Yes.
16 A. Yes.
17 Q. Who did you understand Scott Williams
18 to be?
19 A. Well, he was the one that came around
20 and collected rent. I don't know what he did other
21 than that.
22 Q. And when you say Mr. Arave's
23 accountant, do you mean VanOrden?
24 A. That could be. I really don't
25 remember but that name sounds familiar. What was

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1 any potential buyer of the property?

2 A. I don't believe so.

3 Q. Is it fair to say that Mr. Arave was
4 trying to structure or assist The Children's Center
5 so that its cash flow issues weren't really an
6 issue?

7 A. Yeah, to try to help us stay in
8 business.

9 Q. You feel like he had a vested interest
10 in The Children's Center staying in business
11 because The Children's Center had a lease agreement
12 with High Mark Development; is that a fair
13 statement?

14 A. That's fair.

15 Q. Go back to that letter that's to your
16 left. And that's, again, for the record, Exhibit
17 *012. I'm referring to a conversation that I've
18 had with Mr. Weipel and I'm summarizing it in this
19 letter. And I state -- if you'll go down to --
20 well, probably a little bit before halfway through
21 that second paragraph it starts out, you and I then
22 discussed. Do you see that?

23 A. I see that.

24 Q. You and I then discussed your client's
25 intentions as they relate to its business

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1 consolidate --

2 (Cell phone interruption.)

3 Q. BY MR. ARMSTRONG: I intended to ask
4 you this too before I started. Do you have a time
5 constraint, anything you need to --

6 A. Well, I need to -- if I could take a
7 second, I could call my wife and have her pick up
8 the kids from school.

9 Q. There was a question pending. Let's
10 answer that question and then I'll let you take a
11 break. That's fine.

12 A. Okay.

13 Q. Maybe I should rephrase it.

14 A. Okay.

15 Q. You testified that it was to
16 centralize or to consolidate the operations?

17 A. Uh-huh.

18 Q. Is that a yes?

19 A. Yes.

20 Q. Is it fair to say that the intent of
21 The Children's Center, and let's put it between the
22 period of time on September 18th, 2007, up through
23 the time that O'Shea and his investment group
24 bought that property, the goal or the business
25 model was to consolidate The Children's Center, the

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1 operations and the respective leases. Did I read
2 that correctly?

3 A. Yes.

4 Q. To summarize, you indicated The
5 Children's Center, you being Mr. Weipel, is
6 interested in centralizing its operations in the
7 Idaho Falls building. Did I read that correctly?

8 A. That's correct.

9 Q. And that it was interested in
10 negotiations that could potentially provide The
11 Children's Center with an early release from the
12 Pocatello lease. Did I read that correctly?

13 A. Yes.

14 Q. All right. Does that help refresh
15 your memory as to what the business plan was for
16 The Children's Center, at least as of September
17 18th, 2007?

18 A. Yes.

19 Q. What was the plan then with regard to
20 The Children's Center up until it vacated the
21 property that we've been referring to as the 1675
22 property?

23 A. We were trying to consolidate to stay
24 alive, if that's what you're asking.

25 Q. All right. When you say

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1 business operations, in the 1675 property?

2 A. Yes.

3 Q. You hesitated in responding to that
4 question. Was it just to mull the question over?

5 A. It was the time frame that was the
6 issue because, you know, November, December we were
7 pretty sure we were going down at that stage.

8 Q. Did you ever tell Mr. Arave that
9 though, that you were pretty sure you were going
10 down?

11 A. I didn't tell Gordon that. I told
12 Scott that.

13 MR. ARMSTRONG: Let's take a break now.

14 MR. CROCKETT: You've still got a pending
15 question here.

16 MR. WEINPEL: Let him call his kids. I
17 understand the question. He told Scott that and
18 that's where we were.

19 MR. CROCKETT: Sure.

20 (A recess was taken from 3:38 p.m. to
21 3:40 p.m.)

22 Q. BY MR. ARMSTRONG: Back on the record.
23 I asked you a question about -- your testimony
24 before the break was a conversation that you had
25 with Scott Williams about your having said certain

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1 things to Mr. Williams, and I'd like to go to that
2 conversation. First of all, when was that
3 conversation?
4 A. December. I think it was in the month
5 of December.
6 Q. Of 2007?
7 A. Yes.
8 Q. Where was the conversation?
9 A. In my office.
10 Q. Is that at the 1675 --
11 A. Right.
12 Q. -- office? Was anyone with you?
13 A. Marc Weinpel.
14 Q. All right. And both of you were in
15 the office with Scott Williams?
16 A. Yes.
17 Q. And who was present with Mr. Williams,
18 if anybody?
19 A. Just Mr. Williams.
20 Q. And you knew that Scott Williams was
21 represented by -- or was affiliated with High Mark
22 Development?
23 A. Right.
24 Q. Did you understand that?
25 A. Right.

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1 Q. Now, did you know that -- well, strike
2 that.
3 Give me your fullest recollection of
4 that conversation with Scott Williams where you and
5 Mr. Weinpel were present in your office.
6 A. Well, we just -- he came into my
7 office with Marc Weinpel, and, you know, he wanted
8 to collect rent. And we just leveled with him and
9 said, you know, it's not going to happen, that we
10 can't, and all likelihood is we were going to be
11 filing bankruptcy.
12 Q. Okay. Did you say anything else?
13 A. Just apologies and that type of thing.
14 Q. What do you mean apologizes?
15 A. Well, I mean, I felt bad for being in
16 the position.
17 Q. Did you actually use the word
18 bankruptcy?
19 A. Yeah. I was real clear that we were
20 filing bankruptcy, and even Marc was talking about
21 it too.
22 Q. Did Scott Williams say anything in
23 response to what you were telling him?
24 A. Well, I don't recall what he said. He
25 was obviously disappointed.

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1 Q. How long was the conversation?
2 A. Oh, probably about five minutes.
3 Q. What was Mr. Williams doing at your
4 office?
5 A. He was trying to collect rent.
6 Q. And had he come in -- just dropped in
7 or did he call you, tell you he was coming in?
8 Help me understand that.
9 A. I don't recall. He was coming in
10 fairly often trying to get rent during that period.
11 Q. Okay. So he was coming in to collect
12 rent for December?
13 A. I don't recall what month that he was
14 collecting for. I mean, I think there was a period
15 of time that he was trying to get some rent for.
16 And I believe the way it occurred is Tera was
17 getting frustrated because he was getting kind of
18 aggressive with her.
19 Q. Scott Williams was getting aggressive
20 with Tera?
21 A. Right.
22 Q. So what did Tera do, if anything?
23 A. She just kind of referred it to Marc,
24 and Marc went down and talked to him and brought
25 him up to my office.

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1 Q. Okay.
2 A. That was about it.
3 Q. You didn't get into specifics with him
4 about what the bankruptcy would mean, whether you
5 were going to stay in the property, file a Chapter
6 11?
7 A. No. We told him we were leaving the
8 property.
9 Q. Okay. But you didn't say that
10 earlier. I asked you what your fullest
11 recollection was. You told him that you couldn't
12 pay rent and that in all likelihood you were going
13 to file bankruptcy. And then I asked you did you
14 say anything else and you said no. So you want to
15 change that?
16 A. Well, you sparked my memory. I
17 remembered that we did inform him we were leaving.
18 Q. Well, let's do this again then. I
19 want to know everything that you said to
20 Mr. Williams in that conversation. Let's start
21 over. You told him you couldn't pay rent, right?
22 A. Yes.
23 Q. All right. What else?
24 A. That we were going to file bankruptcy
25 and that we were going to be vacating the building.

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1 I believe in January is when we told him we'd be
2 out.
3 Q. All right. So you told him -- just a
4 second ago you said you would most likely. So did
5 you tell him in this conversation that you were
6 absolutely going to vacate or that you were most
7 likely?
8 A. I don't recall the exact words.
9 Q. So it could have been, we're likely
10 going to vacate or it's likely that you didn't?
11 A. I'm clear that I told him we were
12 going to vacate, but whether I used the word likely
13 or going to, I don't recall that.
14 Q. Okay. Anything else that you said?
15 A. Until my memory gets sparked, I don't
16 recall any other details on that.
17 Q. Did Mr. Weinpel say anything in that
18 conversation to Mr. Williams while you were
19 present?
20 A. Yes.
21 Q. Give me your fullest recollection of
22 what Mr. Weinpel said.
23 A. I can give you the gist of it, which
24 was, you know, basically the same thing, that we
25 were in a financial position that was going to

1 Q. And I'll just read this to you for the
2 record. It's a short letter. Then I'll have some
3 questions for you. Okay?
4 This letter says, dear Marc, the sale
5 of the Idaho Falls building closed on Monday,
6 December 10th, 2007. The purchaser of the building
7 is the O'Shea Family Trust.
8 I then state, paragraph 12.2 of the
9 Center's lease states that the Center as lessees
10 can now recognize O'Shea as the lessor under the
11 lease agreement. Accordingly, beginning January
12 2008 your rental obligations are to be paid in the
13 order of O'Shea or as otherwise designated by that
14 entity.
15 This letter was dated December 12.
16 Can you identify or help me understand when this
17 conversation with Scott Williams would have
18 occurred in relation to this letter?
19 A. I don't recall that letter. So as far
20 as the timing when that was received and whatnot, I
21 have no clue.
22 Q. But events identified in this letter,
23 for instance the closing, because I've indicated in
24 this letter that the closing occurred on December
25 10th, 2007.

1 probably require us to file bankruptcy.
2 Q. Okay. So you were in a position where
3 you were probably going to file bankruptcy. Did
4 Mr. Weinpel make any representation about leaving?
5 A. The building?
6 Q. Yes.
7 A. I don't recall.
8 Q. Did Mr. Weinpel say anything else?
9 A. Not that I recall at this time. It
10 was a fairly short conversation.
11 Q. Was anything said in that conversation
12 about how this could or would impact the buyer, the
13 O'Sheas and the investment group with the O'Sheas?
14 A. I don't recall that.
15 Q. Did they come up at all in the
16 conversation?
17 A. I don't recall that part of it, no.
18 Q. Okay. In relation to -- strike that.
19 I don't have a copy of this exhibit
20 but there is a letter from me to Mr. Weinpel. It
21 was in December of '07, December 12th.
22 A. Okay.
23 Q. And it identifies the purchaser as
24 O'Shea.
25 A. Okay.

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1 A. I believe we did inform him prior to
2 closing.
3 Q. Okay.
4 A. I mean, that was brought to my
5 attention.
6 Q. Do you know if -- did you have any
7 conversations about potential plans to move out of
8 the building with Mr. Arave after you talked with
9 Mr. Williams?
10 A. I don't recall any particular
11 discussions with Mr. Arave after that.
12 Q. How about prior to that time?
13 A. About moving out?
14 Q. Correct.
15 A. I don't believe so.
16 Q. Okay. How about Ben Arave?
17 A. No. I'd lost contact with Ben Arave
18 by that time.
19 Q. How about with me?
20 A. I don't believe I talked to you about
21 it.
22 Q. Was that the only conversation that
23 you had with Scott Williams about possibly moving
24 out of the building?
25 A. I believe it was -- with me I think

DEPOSITION OF MATTHEW F. SMITH - 02/17/09

SHEET 34 PAGE 133

1 MR. CROCKETT: Excuse me. Can I go off the
2 record just a minute, Counsel.
3 (A discussion was held off the
4 record.)
5 Q. BY MR. ARMSTRONG: Back on the record.
6 Who is Advanced Practice Management,
7 Inc.?
8 A. That was a management firm that we
9 built to try to manage some of the companies.
10 Q. What's some of the companies? What
11 companies?
12 A. Idaho Children's Center, The
13 Children's Center. We had Children's
14 Rehabilitation Center.
15 Q. What were they hired to do?
16 A. Just do the business administrative
17 piece.
18 Q. And was that to continue to manage
19 operations of The Children's Center at 1675?
20 A. Yes.
21 Q. And these minutes, I'll represent to
22 you, were dated February 7th, 2008, and I'll just
23 read you what the resolution is.
24 A. Okay.
25 Q. The resolution regarding entering into

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1 Children's Center. Does that make sense?
2 Q. I think it does. Would Advanced
3 Practice Management be housed at the 1675 property?
4 A. Yes. Upstairs.
5 Q. Okay. And had space been made
6 available for them to move in and start taking over
7 managing the affairs of Children's Center?
8 A. Yes.
9 Q. And had that space been renovated or
10 created at around this same time that the
11 resolution was passed to hire them?
12 A. It wasn't renovated. It was just --
13 yeah. Advanced Practice Management took over the
14 upstairs.
15 Q. Who was the decision-maker for
16 Advanced Practice Management?
17 A. Myself.
18 Q. Are you the sole shareholder of that
19 entity?
20 A. I am now.
21 Q. And does that entity have any assets?
22 A. No. It, again, is defunct.
23 Q. Are there other shareholders of that
24 entity?
25 A. No.

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1 a management contract with Advanced Practice
2 Management, Inc., as passed at the December 20,
3 2007, meeting, was reaffirmed and passed. Do you
4 remember that?
5 A. Okay. No. But I agree with the
6 record.
7 Q. Okay. So help me understand
8 specifically what Advanced Practice Management was
9 hired to do and the subject of a resolution,
10 they're hiring, it's been passed, it's been agreed
11 to?
12 A. Correct. We were going to manage the
13 business affairs of -- for The Children's Center,
14 so we'd manage the staff, do the payroll, legal,
15 you know, just business affairs type operations.
16 Q. How did you hear about Advanced
17 Practice Management?
18 A. Well, we made it. Let me explain so
19 it will clarify this a little bit. The Children's
20 Center was getting too big to manage, okay, so we
21 broke it out into different pieces. The intent
22 with Advanced Practice Management is that we'd get
23 other contracts from other medical facilities and
24 whatnot to help offset those administrative costs
25 so we could provide administration cheaper to The

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1 Q. Are you the sole shareholder?
2 A. Yes.
3 Q. And did you have an agreement entered
4 into between Advanced Practice Management and The
5 Children's Center?
6 A. I believe so. I'd have to confer with
7 Marc on that.
8 Q. I'd like to see the agreement with
9 Advanced Practice Management.
10 So if I understand it correctly --
11 well, strike that. Was Advanced Practice
12 Management part of this business model to
13 consolidate The Children's Center operations in the
14 Idaho Falls building?
15 A. It was an attempt to lessen the
16 overhead burden on The Children's Center.
17 Q. How was Advanced Practice Management
18 going to be funded?
19 A. Through contracts with different
20 entities including The Children's Center for the
21 services they provided.
22 Q. So there would be employee-related
23 services, administrative services that it would
24 then hire itself out to provide to other parties as
25 well?

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D

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The Children's Center
All Payments Issued for High Mark Development
All Transactions

Type	Num	Date	Amount
Bill Pmt -Check	7054	9/17/2007	28,987.50
Bill Pmt -Check	6995	8/15/2007	28,987.50
Bill Pmt -Check	6925	7/18/2007	28,987.50
Bill Pmt -Check	6802	6/15/2007	28,987.50
Bill Pmt -Check	6742	5/15/2007	28,987.50
Bill Pmt -Check	6661	4/13/2007	28,987.50
Check	6582	3/15/2007	28,987.50
Bill Pmt -Check	6517	2/14/2007	20,000.00
Check	6470	1/24/2007	16,800.00
Check	5947	7/18/2006	27,787.50
Check	5842	6/22/2006	27,787.50
Check	5104	12/13/2005	15,088.00
Check	4968	11/3/2005	15,088.00
Check	4752	9/12/2005	14,711.95
Total			340,175.45

E

1141



1306 2nd Street South
Nampa, Idaho 83651
W (208) 468-7730
F (208) 468-7728

Fax

To: Paul Fife	From: Jeff Needs
Fax: (208) 535-0380	Pages: 3 (including cover page)
Phone: (208) 535-0350	Date: 9/6/2007
Re: Addendum #2	CC:

Paul, attached is Addendum #2 representing the remaining items to be addressed after our on-site review last week. To give you some insight into our position on the remaining items I the following is provided:

Item 1 - The indemnification language is essentially the same as that provided by you previously. The material change is in us requiring that Mr. Arave provide indemnification as well. This is required because we have no idea what assets Seller has, or if it will be an operating entity through the 2016. It has been a challenge getting the Buyer over this hurdle, but Mr. Arave's personal guarantee helps them clear the hurdle.

Item 2 - These items should be self explanatory.

Item 3 - The Buyer understands that some items in the contract have changed and has agreed to increase the Earnest Money to reflect the strong interest and intention they have in purchasing the property.

Item 4 - In lieu of asking the Seller to carry a short term note to accommodate one of the exchanges Buyer is going through, we thought this would be a more acceptable option for him. Also, this extra time will allow for the lender to provide approvals.

Paul, I will be out of the office the rest of the afternoon, but available in the morning to discuss.

Thanks

Handwritten signature/initials

Addendum #2
To Purchase and Sale Agreement Dated August 14, 2007
(the "Agreement")

- 1) **Indemnification of Buyer** – The following replaces lines 11, 12 and 13 of Addendum 1 to the Agreement.
 - a. Seller and Gordon Arave, their assigns, successors and heirs ("Indemnifying Party") hereby indemnifies, defends, and holds harmless Buyer and its successors and assigns, (collectively for the purpose of this section herein, "Indemnified Party") from and against any and all liability, loss, damage, cost and expense, including, without limitation, reasonable attorneys' fees, mortgage penalties and appraisal fees arising out of The Children's Center Inc.'s ("Leasee") attempt to exercise or enforce a purported option to purchase the Premises under a Lease Agreement dated June 26, 2006. Indemnifying Party's duty under this paragraph shall be triggered only upon Indemnified Party's receipt of a written offer to purchase the Premises from the Lessee after June 19, 2009 for a total purchase price of less than \$3,700,000 (the "Triggering Event").
 - b. Upon the occurrence of the Triggering Event, the Indemnified Party shall promptly notify the Indemnifying Party of any attempt to exercise the purported option to which the foregoing indemnification applies and the Indemnifying Party shall undertake, at its own cost and expense, the defense thereof. The Indemnified Party may, at its option and expense, retain own counsel, provided that such counsel fully cooperates with the Indemnifying Party's counsel. If the Indemnifying Party fails to promptly appoint competent and experienced counsel, the Indemnified Party may engage its own counsel in defense thereof, and the reasonable charges in connection therewith shall promptly be paid by the Indemnifying Party. If the Indemnified Party settles any such suit, claim or proceeding, the amount thereof shall be charged to the Indemnifying Party, provided that the Indemnifying Party's prior approval has been secured, which approval shall not be unreasonably withheld.
- 2) **Inspection Period** – Buyer is removing all contingencies with the exception of the items listed below.
 - a. **Loan Assumption:** Buyer to be approved by Seller's lender (the "Lender") to assume current Note and Deed of Trust (the "Loan"). Lender to provide Buyer, for Buyer approval, a document stating the costs associated with assuming the Loan. Loan approval and Loan cost approval to occur at least 10 days prior to Closing. If Lender does not approve Buyer, or Lender costs are unsatisfactory to Buyer, Buyer may terminate this Agreement and receive a full refund of Earnest Money.

- b. **Building Inspection:** Buyer, at Buyer's sole cost, shall contract to obtain a site inspection report. The report shall be completed and approved by Buyer on or before September 21, 2007. Should the report be unsatisfactory to Buyer for any reason, Buyer may terminate this Agreement and receive a full refund of Earnest Money.
- c. **Tenant Estoppel:** Seller to provide Buyer a Tenant Estoppel in like form to the one provided to Buyer on August 24, 2007 by facsimile with the Tenant acknowledging that there will be a rent increase in years four and eight as using the CPI formula outlined in Section 17 of the Lease. In addition, Tenant to attach to the Estoppel a list of all sublease tenants. The Tenant Estoppel to be approved by Buyer on or before September 21, 2007. This date may be extended should Seller require more time to obtain the Tenant Estoppel. Buyer approval to occur no later than 10 days prior to Closing.
- 3) **Earnest Money** – Within 2 business days of Seller approving this Addendum #2, Buyer shall increase Earnest Money to \$100,000. Once the above inspection items are completed, the Earnest Money shall become non-refundable.
- 4) **Warranty Deed** – Per line item 27 of Addendum 1, Buyer still has to approve the Warranty Deed. This shall occur no later than 10 days prior to Closing. Should Buyer not approve the Warranty Deed, Buyer may terminate the Agreement and receive a full refund of Earnest Money.
- 5) **Closing Date** – Closing Date to be extended to November 16, 2007.

Buyer: Thomas O. Lee (Trustee) Date: Sept 6 07

Seller: _____ Date: _____
(High Mark Development LLC)

Gordon Arave: _____ Date: _____
(Gordon Arave)

Last Transaction

<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Identification</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
Sep 6	3:55PM	Fax Sent	12085350380	1:03	3	OK

F

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WOOD CRAPO LLC
Richard J. Armstrong, ISBN 5548
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Officer of High
Mark Development, LLC; BENJAMIN D.
ARAVE, individually and as Officer of High
Mark Development,

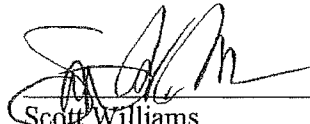
Defendants.

***AFFIDAVIT OF SCOTT
WILLIAMS***

Case No. CV-08-4025

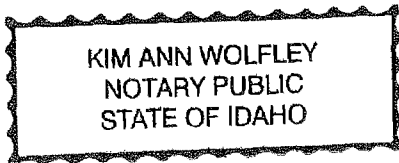
Judge Tingey

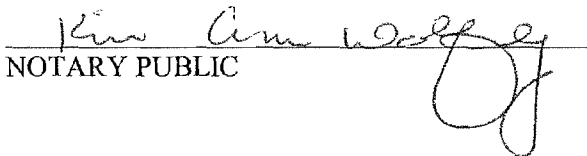
DATED this 11 day of December, 2009.



Scott Williams

SUBSCRIBED AND SWORN before me this 11 day of December, 2009.





NOTARY PUBLIC

S:\WPDATA\PLEADING\HIGH MARK.O'SHEA.SECOND AFFIDAVIT OF SCOTT WILLIAMS.wpd

G

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE)
O'SHEA, Trustees of the Thomas and)
Anne O'Shea Trust u/d/t DATED) Case No.
NOVEMBER 2, 1998; GRANDVIEW CREDIT,) CV-08-4025
LLC, a California limited liability)
company; CALEB FOOTE, an individual,)
KATE LARKIN DONAHUE, an individual,)
JOHN KEVIN DONAHUE, an individual,)
and SAN FRANCISCO RESIDENCE CLUB,)
INC., a California corporation;)

Plaintiffs,)

vs.)

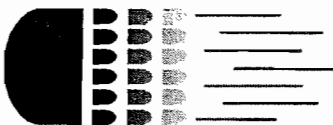
HIGH MARK DEVELOPMENT, LLC, an Idaho)
limited liability company; GORDON)
ARAVE, individually and as Officer)
of High Mark Development, LLC;)
BENJAMIN D. ARAVE, individually and)
as Officer of High Mark Development,)
LLC,)

Defendants.)

DEPOSITION OF MARC J. WEINPEL

Thursday, May 21, 2009, 2:00 p.m.

Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

COPY

REPORTED BY:

Sandra D. Terrill,
RPR, CSR

PREPARED FOR:

1151 MR. ARMSTRONG POST OFFICE BOX 51020
IDAHO FALLS, IDAHO 83405
208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

1 I'm not sure which one.

2 **Q. Do you consider the information**
3 **contained in the Exhibits *-101 through *-110 to be**
4 **reliable?**

5 A. As reliable as our QuickBooks program
6 is.

7 **Q. So in terms of the reliability of the**
8 **records, you wouldn't have any records that would**
9 **be more reliable than what you've provided?**

10 MR. ARMSTRONG: Objection. Foundation.
11 Speculation. Assumes facts too.

12 THE WITNESS: As I tried to explain early
13 on in my testimony, when I came as legal counsel in
14 June or July of 2007, these files were scattered --
15 when I say scattered, there were some in Dale
16 Schneider's office. There were some in Matt's
17 office. There were some in the bookkeeping,
18 probably the majority was in the bookkeeping
19 office. And I tried to collect them. So I don't
20 have that.

21 I believe I've showed this to
22 Mr. Coletti also, but I have a file that was marked
23 R.B. Smith, and it has copies of invoices from
24 Mr. Arave to Matt Smith and The Children's Center,
25 and these are like interest payments on some of his

1 in response to an invoice; is that --

2 A. To the best of my recollection, that
3 is correct.

4 **Q. We've had previous conversations and**
5 **you made reference to the fact that you would see**
6 **Mr. Williams or Mr. Williams would come to The**
7 **Children's Center at 1675 Curlew on behalf of High**
8 **Mark; is that correct?**

9 A. That is correct.

10 **Q. You've previously made reference to**
11 **discussion you had with Mr. Williams in September**
12 **of '07 concerning The Children's Center ongoing**
13 **ability to make its rent payments. Do you recall**
14 **that conversation?**

15 A. I believe I do.

16 **Q. Can you recite or can you just state**
17 **to the best of your recollection when and where**
18 **that conversation took place, who was present, and**
19 **to the best of your recollection what was said**
20 **between you and Mr. Williams?**

21 A. Unless you can give me something to
22 refresh my recollection as to when, all I can tell
23 you is sometime in the time frame you've indicated,
24 September, October of 2007, it was apparent that --
25 we were unable to pay the rent as he had -- well,

1 notes that Matt Smith made. So I have not -- I
2 have not matched those up to what the computer
3 shows, but are there any other records? Yeah,
4 there's those.

5 When I say "those," everything I've
6 just handed you that was in that file I left in
7 that file. I didn't create the file. It was just
8 sitting in bookkeeping or what have you. So I
9 collected those files. And there's some check
10 stubs in there. There's -- so when you ask me is
11 there any other records, I'd have to say that these
12 are the only other records that I have.

13 There's some old files that deal with
14 rent to 1619 Curlew that have check stubs in them.
15 But I'm assuming that the QuickBooks records were
16 the most reliable of all of them.

17 **Q. BY MR. CROCKETT: And those are the**
18 **ones you've provided?**

19 A. Correct.

20 **Q. And those are the ones you've reviewed**
21 **today that we've marked today as Exhibits *-101**
22 **through *-110?**

23 A. That's correct.

24 **Q. And while you may have invoices, this**
25 **would be the record of whatever payments were made**

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1 I'm looking at it. We're looking at a little note,
2 to whom it may concern, September 26th of 2007 from
3 Scott. So the answer to your question, I don't
4 know the exact date. I just know that Scott
5 Williams would come fairly routinely to pick up
6 checks. And Ms. Hanson at the time, Tara Hanson,
7 would ask me to intervene rather than have to deal
8 directly with Mr. Williams.

9 During one of those visits when
10 Mr. Williams came to 1675 Curlew, he was extremely
11 upset. And he -- I took him into Mr. Smith's
12 office, and we had a conversation in that office
13 there.

14 **Q. Okay. And who was present?**

15 A. Mr. Smith, myself, and Mr. Williams.

16 **Q. And what do you recall was said? Can**
17 **you reconstruct the conversation as best as you can**
18 **recall?**

19 A. We told Mr. Williams that we were
20 unable to pay the amount of rent and cam charges
21 and the like. It appeared that we would be heading
22 for possibly bankruptcy.

23 (Exhibits *-010 and *-011 marked.)

24 **Q. BY MR. CROCKETT: Okay. I'm going to**
25 **show you what's been marked as Exhibits *-010 and**

H

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WOOD CRAPO LLC
Richard J. Armstrong, ISBN 5548
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 366-6060
Facsimile: (801) 366-6061

Attorneys for Defendants

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOT, an individual, KATE LARKIN
DONAHUE, an individual, JOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California corporation,

Plaintiffs,

v.

HIGH MARK DEVELOPMENT, LLC, an
Idaho limited liability company; GORDON
ARAVE, individually and as Officer of High
Mark Development, LLC; BENJAMIN D.
ARAVE, individually and as Officer of High
Mark Development,

Defendants.

***AFFIDAVIT OF E. ROBERT
MILLER***

Case No. CV-08-4025

Judge Tingey

STATE OF CALIFORNIA)
)ss:
COUNTY OF _____)

E. ROBERT MILLER, being first duly sworn, deposes and states as follows:

1. My name is E. Robert Miller. I reside in California. I am over the age of 18 years old, and have been retained as an expert witness in the above-referenced case.

2. I have been asked to provide opinions and conclusions relating to the question of whether the plaintiff investors in this case justifiably relied on alleged misrepresentations from the defendants and in relation to the December 2007 purchase and sale of commercial real property located at 1675 Curlew Drive, Ammon, Idaho (the "Property").

3. My credentials and relevant background are set forth in my *curriculum vitae*, a true and correct of which is attached hereto as Exhibit 1.

4. I am familiar with the allegations in the plaintiff investors' *First Amended Verified Complaint*. Specifically, I am familiar with the plaintiff investors' allegations regarding how they claim the defendants misrepresented certain facts in relation to the purchase of the Property, including the execution of two promissory notes to collect rent from the tenant for certain periods of time, and execution of an estoppel certificate dated October 17, 2007.

5. In forming my opinions, I have relied on the following information and facts:

- a. Plaintiff investors' *First Amended Verified Complaint*
- b. Plaintiff investors' statement of facts submitted in support of motion for partial summary judgment, including Jeff Needs affidavit and the document attached to such affidavit, which was filed in support of the plaintiff investors' motion for partial summary judgment
- c. Defendants' statement of facts submitted in support of cross motion for summary judgment
- d. The deposition of Jeff Needs
- e. The deposition of Thomas O'Shea
- f. The deposition of Paul Fife
- g. The Commercial/Investment Real Estate Purchase and Sale Agreement and its addenda
- h. The June 19, 2006 Lease Agreement between High Mark Development, LLC and the Children's Center, Inc.
- i. The October 17, 2007 Lease Estoppel Certificate

6. Having worked extensively in the commercial real estate industry, I am familiar with industry standards relating to estoppel certificates, their purpose, and whether such certificates are typically relied on by buyers of commercial real estate for the purpose of supplanting, superceding, or replacing independent review and analysis of real estate and tenants occupying the real estate.

7. Based on my experience, I am also familiar with the industry standard for conducting due diligence in relation to purchasing commercial real estate.

8. It is standard in the industry for a purchaser of commercial real property to conduct a thorough investigation of its purchase prior to closing on that purchase.

9. Such thorough investigation includes a visual inspection of the property, as well as a building inspection by an appropriate engineer or other professional.

10. If the commercial property is occupied by a pre-existing commercial tenant, an appropriate and thorough investigation also requires the purchaser to meet and talk with the tenant, to meet and talk with the owner, to evaluate all relevant financial information relating to the tenant, including but not limited to the tenant's balance sheet, an appropriate credit report on the tenant, all judgments and bankruptcies pertaining to the tenant, income and expense statements, aged receivables reports, appraisals, tax returns, profit and loss statements, and other relevant financial information.

11. As stated above, I have reviewed the depositions of Jeff Needs and Thomas O'Shea. I have read in those depositions that the only financial information Messrs. Needs and O'Shea reviewed in relation to the tenant was limited to 2005 and 2006 federal income tax returns of the tenant, and the tenant's partial profit and loss statement from January 2007 to June 2007.

12. I also understand from my discussions with Defendants' attorney that some of the plaintiff investors only reviewed two pages from each of the 2005 and 2006 federal income tax returns and the partial profit and loss statement, while other plaintiff investors did not review any financial information related to the tenant and did not ask to review financial information related to the tenant.

13. I also understand from my review of the depositions of Messrs. Needs and O'Shea that none of the plaintiff investors met or talked with the tenant prior to closing, despite Mr. O'Shea testifying in his deposition that he felt it was important for him to meet and talk with

the tenant prior to closing in order to discuss the tenant's business plan and other aspects of the tenant's business.

14. Based on these facts, it is my opinion that the plaintiff investors failed to conduct a thorough investigation of their purchase of the 1675 Curlew property, and therefore could not have justifiably relied on any alleged misrepresentations of the seller.

15. The plaintiff investors in this case did not and could not have justifiably relied on any alleged misrepresentations because they did not conduct the due diligence that was required of them under paragraph 9 of the real estate purchase contract, or as required of the plaintiff investors by way of industry standards governing their performance of due diligence.

16. It is also my opinion that it is not standard in the industry for California purchasers of commercial real estate to rely on an estoppel certificate to the extent claimed by the plaintiff investors in this case.

17. Messrs. Needs and O'Shea both testified in their depositions they felt the limited financial information they reviewed in relation to the tenant was adequate due diligence on their part in light of representations made in the October 17, 2007 estoppel certificate, which was signed by the tenant.

18. It was unreasonable for the plaintiff investors to rely heavily or primarily on *any* estoppel certificate as an excuse to not meet with the tenant or the owner prior to closing, or to conduct the other aspects of their due diligence that were required of them under paragraph 9 of the real estate purchase contract and industry standard. In my opinion, the plaintiff investors were unjustified in relying on the estoppel certificate to the extent they did.

19. In the commercial real estate industry, an estoppel certificate generally serves the limited purpose of making the buyer aware that a tenant occupies the premises, and that a lease agreement has been signed. It is not standard in the industry for a buyer of commercial real estate to rely on an estoppel certificate for the purpose of determining the solvency or credit worthiness of a tenant, especially when the investment is \$3.7 million, involves an existing commercial tenant that has only occupied the property for less than 18 months prior to the purchase, and the term under the existing lease agreement is ten years.

20. In such a situation, it is imperative on the part of the purchaser to conduct a thorough investigation into the tenant to determine its credit worthiness and its current and long term financial health.

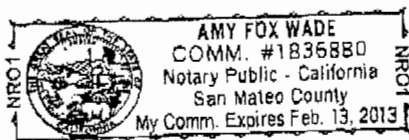
21. It is my opinion that none of the plaintiff investors or their representatives conducted any such thorough investigation into the tenant.

DATED this 10th day of December, 2009.

E. Robert Miller

E. Robert Miller

SUBSCRIBED AND SWORN before me this 10th day of December, 2009.



A. Fox Wade
NOTARY PUBLIC

BONNEVILLE COUNTY

10 17 11

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

THOMAS O'SHEA and ANNE DONAHUE
O'SHEA, Trustees of the Thomas and Anne
O'Shea Trust u/d/t DATED NOVEMBER 2,
1998; GRANDVIEW CREDIT, LLC, a
California limited liability company; CALEB
FOOTE, an individual, KATE LARKIN
DONAHUE, an individual, HOHN KEVIN
DONAHUE, an individual, and SAN
FRANCISCO RESIDENCE CLUB, INC., a
California Corporation,

Plaintiffs,

vs.

HIGH MARK DEVELOPMENT, LLC, AN
Idaho limited liability company; GORDON
ARAVE, individually and as Member of High
Mark Development, LLC; JARED ARAVE,
individually and as Member of High Mark
Development, LLC; BENJAMIN ARAVE,
individually and as Member of High Mar
development, LLC,

Defendants.

Case No. CV-08-4025

**MEMORANDUM DECISION AND ORDER
ON MOTIONS FOR SUMMARY
JUDGMENT**

THIS MATTER is before the Court on the Parties' cross motions for summary judgment and Defendants' motion to strike Richard Armstrong's affidavit. The Court heard oral argument on December 22, 2009 and took the matter under advisement. Plaintiffs have since withdrawn their motion to strike Armstrong's affidavit.

STATEMENT OF FACTS AND PROCEEDINGS

Defendant High Mark Development, LLC (High Mark) owned a commercial real estate building located at 1675 Curlew Drive, Ammon, Idaho (the Property). On June 20, 2006, High Mark entered into an agreement to lease the Property to The Children's Center, Inc. (the Center) for ten years. The Center agreed to pay \$24,987.50 per month for rent and \$4,000.00 per month for common area maintenance (CAM). The lease agreement provided the Center with an option to purchase the Property after three years.

The Center failed to pay rent for August 2006 through January 2007. Plaintiffs allege that the Center's failure to pay rent during this time was due to financial problems and that Defendant Gordon Arave was well aware of the Center's troubles. On April 18, 2007, Defendants Gordon and Jared Arave executed a promissory note lending the Center \$199,900.00. According to the terms of the promissory note, the \$199,900.00 represented \$149,925.00 in "rent deferral" and \$49,975.00 in "additional cash." The rent deferral equaled six months worth of rent; the same number of months the Center had failed to pay. The Center never repaid the April 18, 2007 promissory note.

In June 2007, High Mark listed the Property for sale. High Mark's real estate agent, Paul Fife, posted information about the Property on a website known as "LoopNet." The LoopNet advertisement stated that the "Scheduled Gross Income" and "Net Operating Income" were \$299,850.00 (the equivalent of twelve months rent) with a "Cap Rate" of eight percent.

Plaintiff Tom O'Shea learned about the Property from Jeff Needs, a real estate agent in Boise, Idaho. On August 14, 2007, Plaintiff O'Shea Family Trust (the Trust)

agreed to purchase the Property from High Mark. The Purchase and Sale Agreement called for High Mark to provide the Trust with certain documents concerning the Center, including the Center's 2005 and 2006 tax returns and a current balance sheet. The Trust received the tax returns, but alleges that the balance sheet was never sent. In addition to receiving the tax documents, the Trust received via fax a financial document stating that High Mark had received \$324,836.00 in rent from June 2006 through July 2007. Although the fax appears on its face to have been sent from High Mark, the individual defendants claim they didn't send it.

The Purchase and Sale Agreement also required High Mark to deliver to the Trust, as a condition to closing, a Lease Estoppel Certificate (the Certificate) signed by the Center. In order to induce the Center to sign the Certificate and further release an option to purchase, High Mark and Defendants Gordon and Jared Arave agreed to release the Center from the April 18, 2007 promissory note and amend another note. Defendants allegedly did not disclose to Plaintiffs the consideration given to persuade the Center to sign the Certificate. In fact, Plaintiffs contend that they had no knowledge of the rent deferred promissory notes until June 2008.

The signed Certificate certified, *inter alia*, that: (1) other than the lease and the agreement to release the purchase option, no other agreements existed between the Center and High Mark affecting the Property; (2) all monthly rent had been paid through the end of September 2007; and (3) the Center was not in default under the lease. After the Center signed the Estoppel on October 18, 2007, High Mark delivered the Certificate to Fife who, in turn, sent it to Plaintiffs. The sale closed in December 2007.

The Center failed to pay rent to High Mark for October, November and December 2007. In lieu of paying October and November rent to High Mark, the Center signed a promissory note for two months worth of rent, which was never paid. Like the April 18, 2007 promissory note, the Trust allegedly did not find out about this promissory note until after litigation began.

In January 2008, the Center's attorney, Marc Weinpel, informed Needs that the Center could not pay rent and that it intended to vacate the Property. On March 1, 2008, the Center vacated the Property and soon thereafter went out of business. The Center never paid any rent to the Trust.

On October 3, 2008, Plaintiffs' counsel wrote a letter to Defendants offering to tender the Property back to Defendants in an attempt to rescind the purchase of the Property and return the Parties to their pre-contract positions. Defendants refused to rescind the purchase of the Property.

Plaintiffs initiated the present action alleging breach of contract, breach of implied covenant of good faith and fair dealing, fraudulent misrepresentation and fraudulent nondisclosure. In prior rulings, the Court dismissed Plaintiffs' breach of contract (Count 1) and breach of the covenant of good faith and fair dealing (Count 2) claims as against the individual defendants. The Court also dismissed Plaintiffs' claims for negligent concealment and negligent misrepresentation (Counts 3 and 4). The remaining claims consist of breach of contract and breach of the covenant of good faith and fair dealing as against High Mark (Counts 1 and 2), and actual fraud and constructive fraud (Counts 3 and 4) as against all Defendants.

In the present motions, Plaintiffs claim that as a matter of law, High Mark breached the purchase contract. Plaintiffs also claim that Defendants made the following fraudulent misrepresentations: (1) the LoopNet ad stating that "Schedule Gross Income" and "Net Operating Income" were \$299,850.00; (2) two faxes allegedly sent from High Mark showing \$324,836.00 in rent collected from June 2006 through July 2007; (3) the Estoppel Certificate, which stated that the Center was current on rent, not in default under the lease and that it did not have any undisclosed agreements with High Mark concerning the Property; and (4) an alleged statement by Gordon Arave to Fife (relayed to Needs) that the Center "had always paid rent on time and he hadn't had any real problems."

Defendants contend that Plaintiffs have failed to establish the necessary elements for fraud. Further, Defendants argue that Plaintiffs failed to adequately complete due diligence before purchasing the Property. In the alternative, Defendants seek summary judgment dismissing the individual defendants from the lawsuit on the basis that the allegedly fraudulent statements cannot be attributed to them.

STANDARD

Summary judgment is only appropriate if "the pleadings, depositions, and admissions on file, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). When considering a motion for summary judgment, any disputed facts are construed in favor of the nonmoving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the nonmoving party. *Finholt v. Cresto*, 143 Idaho 894, 896, 155 P.3d 695, 697 (2007). If reasonable minds might come to different

conclusions, summary judgment is inappropriate. *McPheters v. Maile*, 138 Idaho 391, 394, 64 P.3d 317, 320 (2003).

The party moving for summary judgment bears the burden of proving that no genuine issue of material fact exists. *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009). Once the moving party establishes the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007). In order to survive a motion for summary judgment, the nonmoving party must show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *McGilvray v. Farmers New World Life Ins. Co.*, 136 Idaho 39, 42, 28 P.3d 380, 383 (2001), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). The non-moving party’s case must be anchored in something more than speculation: a mere scintilla of evidence is not enough to create a genuine issue. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 960, 963 (1994).

Even though both parties file motions for summary judgment, genuine issues of material fact may still exist. *Moss v. Mid-Am. Fire & Marine Ins. Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982). In addition, the filing of cross-motions for summary judgment does not transform “the court, sitting to hear a summary judgment motion, into the trier of fact.” *Id.* The applicable standard of review remains the same when a court considers cross motions for summary judgment. *Lawrence v. Hutchinson*, 146 Idaho 892, 897, 204 P.3d 532 (Ct. App. 2009). Each party’s motion must be evaluated on its own merits. *Id.*

ANALYSIS

A. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs argue that they are entitled to summary judgment as a matter of law on their claims of breach of contract, violation of the covenant of good faith and fair dealing, fraud, and fraud by nondisclosure.

1. Breach of Contract.

There is no dispute that as a condition of closing the sale of the property, the tenant was to sign a Lease Estoppel Certificate. Addendum 1 to the Purchase Agreement stated the following:

Seller shall deliver to Buyer and (sic) estoppel for the Tenant 10 days prior to closing. Should the information provided on the estoppel differ from the information provided by Seller, Buyer shall have the option to terminate the Agreement and receive full refund of Earnest Money. . . .

The initial issue is whether the obligation to provide the Certificate was a contractual obligation of the seller, High Mark. The Court finds that it was.

The tenant was not under any obligation to Plaintiffs to provide the Certificate. Instead, it was High Mark's obligation to provide the Certificate as a condition precedent to proceeding with the closing. As such, providing the Certificate to Plaintiffs was part of High Mark's obligations under the Agreement.

Some of the more important representations contained in the Certificate are that the Lease had not been " . . . modified, supplemented, altered or amended in any respect . . .", that the Tenant "is not aware of the existence of any condition which . . . would constitute a default under the Lease . . .", that "[a]ll minimum monthly rent has been paid to the end of the current calendar month, which is September 2007 . . .", and that " . . . the

[tenant] is not in default under the Lease and is current in the payment of any taxes, utilities, or other charges required to be paid by the undersigned.”

As the evidence reflects, the foregoing representations were false, at least in part. The tenant and High Mark had previously modified and/or altered the Lease as to make arrangements for unpaid rent and collect the “deferred” rental payments at a later date pursuant to promissory notes. Furthermore, the evidence establishes that not “all minimum monthly rent has been paid”. Rent owed to High Mark in fact remained unpaid.

However, the record does not necessarily establish a “default” on the part of the tenant. As set out in the Agreement, “default” is defined as an occurrence where the “Lessee fails to timely pay any installment of the Monthly Rent or Lessee’s share of any other sum due under this Lease, *and such failure is not cured within five (5) days after written notice is given to Lessee*” (emphasis added). While the record is clear that the tenant failed to make rental payments timely, the record does not establish written notice to the tenant and a failure to cure within five days thereafter. Pursuant to the Lease Agreement, such action was also necessary before the tenant would be in “default”. Accordingly, whether the tenant was in default at the time of the Estoppel Certificate remains an issue of fact.

Still, representations in the Certificate to the effect that there had been no modifications to the Lease and that all rent had been paid were inaccurate. To the extent a contract requires one party to provide information to the other party in anticipation of completing the agreement, it is at least implicit in the agreement that the information will

be accurate and reliable. This obligation may also be characterized as the implied covenant of good faith and fair dealing.

The covenant requires “that the parties perform in good faith the obligations imposed by their agreement,” and a violation of the covenant occurs only when “either party ... violates, nullifies or significantly impairs any benefit of the ... contract”

Idaho First Natl. Bank v. Bliss Valley Foods, 121 Idaho 266, 288, 824 P.2d 841, 863 (1991); See also *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 203 P.3d 694 (2009).

This Court finds that the above identified statements contained in the Estoppel Certificate where false. The presentation of the false and misleading statements constituted a breach of the implied covenant of good faith and fair dealing, and therefore was a breach of the agreement. This conclusion is not affected by the fact that Plaintiffs may have played a significant role in drafting the Certificate. If as High Mark alleges Plaintiffs were making unreasonable or improper demands as to the language to be included in the Certificate. High Mark did not have to accede to those demands. To the extent such action would have thwarted the sale, then so be it. It was however not a viable option for High Mark to meet its contractual obligation to provide a Certificate by providing a Certificate with false information.

While the Court finds a breach of contract with regard to the Estoppel Certificate, such does not necessarily establish a right of the Plaintiff to recover. High Mark has argued and produced evidence that notwithstanding the Certificate, Plaintiffs’ agent (or alleged agent) Jeff Needs was advised prior to closing of the existence of promissory notes and that the tenant’s obligations on the promissory note were forgiven in exchange for the tenant signing the Certificate. Paul Fife testified that he also forwarded the tenant’s balance sheets to Needs, which sheets identified promissory notes, etc. Evidence

also indicates that prior to closing Plaintiffs were in possession of the tenant's tax returns and profit and loss statements, which allegedly identified the tenant's financial condition.

As such, an inference arises that statements made in the Certificate, while inaccurate, were not a proximate cause of damages because accurate information was disclosed elsewhere. The right to recover alleged damages for breach of contract is contingent upon proof that damages were caused by the breach:

As noted above, the State's failure to prevent an obstruction represented a breach of a contractual obligation imposed by the license for the fish screen. In order to recover damages for a breach of contract, the aggrieved party must show that his loss actually resulted from the breach. *E.g.*, *Graham v. Asbury*, 112 Ariz. 184, 540 P.2d 656 (Ariz.1975).

Challis Irr. Co. v. State, 107 Idaho 338, 343, 689 P.2d 230, 235 (App.,1984).

While the Court finds that providing the inaccurate Estoppel Certificate was a breach of the Agreement as a matter of law, ultimately, issues of fact exist as to whether information other than the Estoppel Certificate was provided to Plaintiffs, and whether the inaccurate information in the Certificate proximately caused Plaintiffs' alleged damages.¹

2. Fraud

Plaintiffs allege that certain representations made by High Mark and its agents constitute fraud as a matter of law. The elements of fraud are as follows:

To successfully bring an action for fraud, a plaintiff must establish the existence of the following elements: (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury. *Trees v. Kersey*, 138 Idaho 3, 10, 56 P.3d 765, 772 (2002).

¹ As discussed below, the issue is what information was actually received by the Plaintiffs, not what information the Plaintiffs could have discovered through their own investigation.

Mannos v. Moss, 143 Idaho 927, 155 P.3d 1166, 1170 (2007).

Generally, the question of whether the evidence has established the elements of fraud is reserved for a jury. *King v. Lang*, 136 Idaho 905, 42 P.3d 698 (2002); *Perkins v. Thorpe*, 106 Idaho 138, 142, 676 P.2d 52, 56 (App.1984).

a. The LoopNet ad.

Plaintiffs allege fraud based upon representations made in an ad for the sale of the property, which has been referred to as the LoopNet ad. Generally, sales talk or puffing can not be the basis of a claim for fraud:

Although the general rule with regards to “trade talk,” “dealer's talk,” “puffing,” and “seller's talk,” is that such statements do not amount to actionable misrepresentation, this rule is not applicable where the parties to the transaction do not stand on equal footing or have equal means of knowing the truth. *Weitzel v. Jukich*, 73 Idaho 301, 251 P.2d 542 (1952).

G & M Farms v. Funk Irr. Co., 119 Idaho 514, 522, 808 P.2d 851, 859 (1991).

The purpose of such an ad is to catch the attention of potential purchasers and invite further inquiry. The evidence does not suggest, and it would not be reasonable to conclude, that Plaintiffs’ decision to purchase the property was based on the ad. Accordingly, the Court finds that the LoopNet ad does not support a claim of fraud.

b. Statements by Paul Fife.

Plaintiffs argue that fraud is established by statements made by Gordon Arave to High Mark’s agent Paul Fife to the effect that the Children’s Center was a good tenant and had not missed any rent payments. Arave however did not communicate that alleged statement directly to any representative of Plaintiffs. Instead, Plaintiffs assert that fraud occurred when Fife repeated the statement to Jeff Needs. However, Needs acknowledged

that Fife had qualified the statement that “as far as he knew”, the tenant had made all rental payments.

The statement, as qualified, does not constitute a representation of fact but rather an opinion.

As a general rule, fraud cannot be predicated upon what, as a matter of law, amounts to, or in factual cases is found by the trier of fact to be, the mere expression of an opinion not intended to be relied upon as a statement of fact. *Barron v. Koenig*, 80 Idaho 28, 324 P.2d 388 (1958); *Fox*, 66 Idaho at 380, 159 P.2d at 227-28; *Mitchell v. Barendregt*, 120 Idaho 837, 820 P.2d 707 (Ct.App.1991); *Bodine v. Bodine*, 114 Idaho 163, 754 P.2d 1200 (Ct.App.1988); 37 AM.JUR.2D *Fraud and Deceit* § 45 (1968).

Jordan v. Hunter, 124 Idaho 899, 907, 865 P.2d 990, 998 (App.,1993).

The Court finds that the foregoing statement by Fife does not support a claim of fraud.

c. Rent and Cam Charge

Plaintiffs also argue fraud on the basis of documents provided to Plaintiffs indicating rent received and CAM charges. The documents represented that High Mark had received rent from the tenant from June 2006 through July 2007 in the amount of \$324,836, when in fact that amount of rent had not been received.

While the inaccurate documents were clearly submitted on behalf of High Mark, the question of fraud again turns on the issue of whether Plaintiffs knew from other information provided by High Mark that the documents were inaccurate. The elements of fraud include the hearer’s ignorance of the falsity of the statement and justifiable reliance. Based on the evidence, an inference exists that other information provided to Plaintiffs would militate against Plaintiffs believing the representation or relying on it. As such, issues of fact preclude a summary finding of fraud as to these documents.

d. Estoppel Certificate.

While the Court has found that inaccurate information contained in the Certificate constituted a breach of the agreement, it does not necessarily follow that the Certificate is a basis for a claim of fraud. As with the representation regarding rental payments and CAM charges, there is an issue of fact as to whether other information provided to Plaintiffs would preclude a finding of all of the elements of fraud, including the hearer's ignorance of the falsity of the statement, reliance by the hearer, justifiable reliance, and resultant injury.

Accordingly, there are genuine issues of material fact precluding summary judgment on this issue.

3. Constructive Fraud

Idaho Courts have recognized a claim of constructive fraud, or fraud by nondisclosure. The duty to disclose appears to have its genesis in the Restatement of Torts, Second, §551, which was relied upon in earlier decisions establishing the cause of action. *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966); *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). That Section provides in part as follows:

One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . facts basic to the transaction . . .

More recently, in *Sowards v. Rathbun*, 134 Idaho 702, 707, 8 P.3d 1245, 1250 (2000), the Court identified the circumstances where a duty to disclose will arise:

A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent a partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party

knowing the fact also knows that the other does not know it. [emphasis added]

Summary judgment under this theory is also precluded by genuine issues of fact. Defendant has produced evidence that information regarding promissory notes and the tenant's financial condition was provided to Plaintiffs prior to the closing. It is for a jury to determine whether the alleged undisclosed information as to the tenant's financial condition was so vital, material, and unknown by Plaintiffs that it should have been timely disclosed by High Mark.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1. All Defendants

Defendants argue that they are entitled to summary judgment on the grounds that if Plaintiffs misunderstood the financial condition of the tenant, it was due to Plaintiffs' own lack of due diligence. Defendants argue that by taking certain steps to investigate the financial standing of the tenant, Plaintiffs could have readily been apprised of the tenant's past and present financial status.

This position has found little support by the courts. Indeed, courts have rejected the argument that a party had no right to rely on a misrepresentation since other evidence identifying the falsity of the representation was available to the hearer.

In their counterclaim, the Weicks alleged that the Watsons committed fraud by providing financial data that "misrepresented the value of the corporation by misrepresenting the actual corporate expenses" and that "misstated the true financial condition of the company." Relying upon *Faw v. Greenwood*, 101 Idaho 387, 613 P.2d 1338 (1980), the district court dismissed the fraud claim on the ground that "Defendants' due diligence foreclosed any reasonable or actual reliance on any allegedly incorrect or fraudulent statements of the Plaintiffs." The district court erred in its application of *Faw v. Greenwood* because it failed to consider whether the books and records actually examined by the Weicks contained information that disclosed the inaccuracy of the alleged representations.

Watson v. Weick, 141 Idaho 500, 506, 112 P.3d 788, 794 (2005) (emphasis added).

In *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977), the Supreme Court held that where the seller of a farm showed the buyer an ASCS document overstating the number of cultivated acres, a false representation had occurred. The Court reversed a district judge's involuntary dismissal of the buyer's suit for damages based upon a shortage of actual acres. In response to a contention that the seller's conduct had been innocent, the Court cited *Lanning* and added the following comments:

* * * * *

Finally, we observe that respondents ... challenge appellants' *right to rely* on the [ASCS] figures in light of their opportunity to check the figures themselves at the tax assessor's office, or by a survey of the land. The trial court did not address this particular element of fraud in its bench remarks. Such argument, however, has never found favor with this Court:

"False statements found ... to have been made and relied on cannot be avoided by the appellants by the contention that the respondents could have, by independent investigation, ascertained the truth.

"The appellants having stated what was untrue cannot now complain because the respondents believed what they were told. Lack of caution on the part of respondents because they so believed, and the contention that respondents could have made an independent investigation and determined the true facts, is no defense to the action." *Weitzel v. Jukich*, 73 Idaho 301, 305, 251 P.2d 542, 544 (1953).

* * * * *

If a seller engages in fraud, he will be liable unless the buyer actually examines sources of information used by the seller and draws his own independent conclusions. Conversely, if the buyer merely has an opportunity to examine such sources, but does not do so because he reasonably relies upon what the seller tells him, then he is entitled to relief from the seller's misrepresentation, whether made fraudulently or not.

Snow's Auto Supply, Inc., 108 Idaho 73, 77, 78, 696 P.2d 924 (App. 1985).

Accordingly, a party's failure to exercise "due diligence" does not preclude a fraud claim. This is true whether alleging actual fraud or constructive fraud.

In *Watts v. Krebs*, 131 Idaho 616, 962 P.2d 387 (1998), the parties were owners of certain real property as tenants in common. In the course of partitioning the property, the plaintiff agreed to accept a certain portion of the property unaware that the defendant had

logged the property. A finding of fraud by nondisclosure at the time of trial was affirmed on appeal:

Krebs relies on *Brooks v. Jensen*, 75 Idaho 201, 270 P.2d 425 (1954), for the proposition that the nondisclosure must be of a fact or circumstance not apparent by the obvious condition of the property, arguing that he had no duty to disclose the fact of harvesting because Watts could have learned that fact had she surveyed the property. However, *Brooks v. Jensen* does not specifically hold that fraud by nondisclosure must involve nondisclosure of a fact or circumstance not apparent by the obvious condition of the property. On the other hand, in *Sorenson v. Adams*, 98 Idaho 708, 571 P.2d 769 (1977), overruled on other grounds by *Owen v. Boydstun*, 102 Idaho 31, 624 P.2d 413 (1981), this Court expressly concluded that the purchasers' failure to investigate a misstatement of tillable acreage made in a document given to them by the vendor did not negate their right to rely on the misstatement. *Id.* at 715, 571 P.2d at 776. The figures in the document had been prepared by the United States Department of Agriculture, but the purchasers brought an action for misrepresentation against the vendor. In noting that "silence, in circumstances where a prospective purchaser might be led to harmful conclusions, is a form of 'representation,'" the Court concluded that the vendor's failure to say anything when he gave the purchasers the document containing the misstatement of tillable acreage amounted to a misrepresentation. *Id.* The fact that the purchasers could have checked the accuracy of the figures by visiting the tax assessor's office did not negate the purchasers' right to rely on the figures. *Id.*

Assuming that Watts could have discovered the fact of harvesting by conducting a survey of the property, her failure to investigate does not negate her right to rely on Krebs' duty to disclose all material facts which would affect her decision to partition.

131 Idaho at 621.

Accordingly, claims of fraud do not entail a duty to conduct an independent investigation or other type of "due diligence".

Defendants, however, raise the additional issue that Plaintiffs contractually agreed to rely upon their own investigation. Defendants refer to Paragraph 9(B) of the Agreement, which provides as follows:

If BUYER does not within the strict time period specified give to SELLER written notice of disapproved items, BUYER shall conclusively be deemed to have; (a) completed all inspections, investigations, review of applicable documents and disclosures; (b) elected to proceed with the transaction; and (c) assumed liability, responsibility and expenses for repairs or corrections other than for items which SELLER has otherwise agreed in writing to repair or correct.

It is the Court's opinion that Defendants read the foregoing provision too broadly.

When considering and applying the provisions in a contract, the court is also to consider the contract as a whole. *Bybee v. Isaac*, 145 Idaho 251, 178 P.3d 616 (2008); *Dille v. Doerr Distributing Co.* 125 Idaho 123, 126, 867 P.2d 997, 1000 (App.,1993).

When considering the Agreement as a whole, and particularly those provisions in close proximity to the foregoing provision, the language does not support summary judgment. Specifically, subsection "a" refers to an inspection and investigation of the subject property, and review of documents identified in the preceding paragraph, i.e., income and expense statements, etc. Accordingly, absent a timely notice of disapproval, Plaintiffs are deemed to have inspected the property and reviewed the identified documents. There is, however, no obligation on the part of the Plaintiffs to conduct a separate investigation or any additional due diligence.

Subsection "b" also indicates that absent a timely objection, the Buyer is considered to have elected to proceed to closing. However, again, this does not impose some obligation on the part of the Plaintiffs to conduct a separate investigation.

Subsection "c" refers only to an investigation of the property, and items in need of repair or correction. Under this subsection, unless there is a demand the Buyer assumes liability for any such property repairs. Again, the section does not impose a duty on Plaintiffs to ascertain the financial condition of the existing tenant.

Additionally, courts have refused to enforce contract clauses which attempt to insulate a party from responsibility for that party's misrepresentations.

Appellants attempt invocation of a clause contained in the contract of sale and purchase to the effect that purchaser has inspected the property and has not been influenced by any representation by the seller, other than as contained in the contract. Such a clause is against public policy and not effective, for it would allow a guilty party to profit by his own wrong. *Advance-Rumely-Thresher Co. v. Jacobs*, 51 Idaho 160, 4 P.2d 657; *J. I. Case Co. v. Bird*, 51 Idaho 725, 11 P.2d 966; *Utilities Engineering Institute v. Criddle*, 65 Idaho 201, 141 P.2d 981.

Summers v. Martin, 77 Idaho 469, 474, 295 P.2d 265, 267 - 268 (1956).

Paragraph 9(B) of the purchase agreement is not enforceable for the purpose of defeating a claim of fraud. The same is true for a contract's merger clause. A merger clause in a contract does not apply to claims of fraud. *Posey v. Ford Motor Credit Co.* 141 Idaho 477, 480, 111 P.3d 162, 165 (App.,2005).

Accordingly, this Court finds that the Purchase Agreement does not impose some obligation on the part of the Plaintiffs to conduct an independent investigation as to the tenant. The provisions in the Agreement are not a basis for awarding summary judgment dismissing the Plaintiffs' claims.

2. Individual Defendants

Defendants also seek summary judgment as to the individual defendants. As previously set out, this Court previously dismissed the breach of contract claims (Counts 1 and 2) as against the individual defendants.² The individual Defendants also seek to dismiss the fraud claims (Counts 3 and 4) on the grounds that the evidence does not support a claim of personal participation in the alleged fraudulent conduct.

² Such claims are dismissed whether raised in the original complaint or amended complaint.

It is clear that an individual can be personally liable for fraud committed in a representative capacity. The following jury instruction was approved in *VFP VC v.*

Dakota Co., 141 Idaho 326, 109 P.3d 714, 722 (2005):

It is an established principle of corporations [sic] law that corporate directors are not liable merely by virtue of their office for fraud or other tortuous wrongdoing committed by the corporation or its officers. Instead, to be held liable a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers. For Mr. Durkin to be held personally liable for any torts committed by Dakota Co. or LJD Holdings or B & D Foods, the evidence must establish that he specifically directed, actively participated in, or knowingly acquiesced in the fraudulent activities as president of Dakota Co. or LJD Holdings Inc. or B & D Foods.

In this case, there is evidence which creates at least an inference that Gordon Arave was aware of the contents of the Estoppel Certificate and was actively involved in having the Certificate signed by the tenant and then presented to Plaintiffs. The Court also takes note of the evidence that Gordon Arave was the individual primarily directing the affairs of High Mark. As such, issues of fact preclude summary judgment dismissing the fraud claim against Gordon Arave.

As to Jared Arave and Benjamin Arave, the Court finds that the evidence does not create an inference of personal participation on their part of any actual fraud. Plaintiffs' claim of actual fraud will be dismissed as against these individual defendants. However, a dismissal of the fraud claim against these two individuals is interlocutory. If at the time of trial evidence indicates personal involvement in alleged fraud, the Court will reconsider this ruling.

As to the claim of fraud by nondisclosure, the evidence is sufficient to raise an inference that each individual defendant, as a representative of High Mark, breached a duty to disclose the tenant's financial condition to the Plaintiffs.

C. ATTORNEY FEES

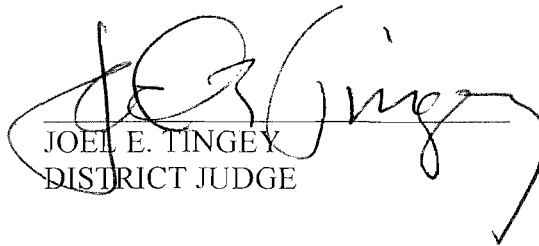
In their briefs, the Parties have argued for and against an award of attorney fees. Based on the Court's decision, a discussion of an award of attorney fees is premature.

CONCLUSION AND ORDER

Plaintiffs' motion for summary judgment is granted in part and denied in part. The Court finds as matter of law that the inaccurate information provided in the Estoppel Certificate was a breach of contract. The remainder of Plaintiffs' motion is denied. Defendants' motion for summary judgment is granted in part and denied in part. Summary judgment is granted to individual defendants Jared Arave and Benjamin Arave on the claim of actual fraud. The remainder of Defendants' motion for summary judgment is denied.

IT IS SO ORDERED.

DATED this 14 day of January, 2010.


JOEL E. TINGEY
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of January, 2010, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

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RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By ms
Deputy Clerk